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In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-927

RALPH TROPIANO,
PETITIONER,

v.

ROBERT I. MOSELEY,
Warden of Federal Penitentiary
at Leavenworth, Kansas,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Petitioner, Ralph Tropiano, respectfully prays that a writ of certiorari issue to review the judgment, without opinion, of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 11, 1971.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 11, 1971. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Does the following charge constitute a comment upon a Defendant's election not to testify:

> "The doctrine of presumption of innocence, in a few words, is that the accused is presumed to be innocent unless and until his guilt is established and proven. That is, at the time this trial started, the accused, Ralph Tropiano, appeared before you with a clean slate. Nothing which you may have known or surmised about him, if there was any such, may be considered by you in arriving at your verdict. The fact, for instance, that the State's Attorney has decided to press a charge against an accused person should not weigh at all as against that accused, in the minds of you, the jury, in passing on the question of his guilt or innocence. In short, so far as you are concerned, this accused is innocent of the crime charged unless and until the evidence produced before you here in court satisfies you of his guilt.
>
> "From the fact that a man is presumed to be innocent, the next principle follows; namely, that the burden of proof is upon the State throughout the trial to prove an accused guilty and an accused does not have to prove his innocence. That is to say, it is incumbent upon the State to carry the burden of proving its case in all its essential elements before a verdict of guilty may be rendered. Mr. Ralph Tropiano was under no obligation to go forward with witnesses to defend himself or take the stand. No presumption, no inference of any kind should be drawn against him because he hasn't undertaken to testify or because he has not called witnesses in his behalf.
>
> "The accused had the right to testify if he so elects.

He has the right to call witnesses and explained [sic] the case from his standpoint, but no inference of guilt should be drawn against him for the reason alone that he does not elect to exercise either of those rights; because, as I have said, he is presumed to be innocent and the State has upon it impressed by law the burden of overcoming that presumption and establishing beyond a reasonable doubt every essential element of the crime charged. And, until that is established by evidence beyond a reasonable doubt, the presumption of innocence is not overcome."

2. Does the admission into evidence of a telephone conversation reflecting declarations of a police officer made to a co-conspirator outside the presence of a defendant constitute a denial of due process.

Statutory Provisions Involved

UNITED STATES CODE TITLE 18.

§ 1404. *Motion to suppress—appeal by the United States*

In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence made before the trial of a person charged with a violation of —

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec, 174), or

(3) the act of July 11, 1941, as amended (21 U.S.C., sec. 184a).

This section shall not apply with respect to any such motion unless the United States attorney shall certify, to the judge granting such motion, that the appeal is not taken for purposes of delay. Any appeal under this section shall be taken within 30 days after the date the order was entered and shall be diligently prosecuted. Added July 18, 1956, c. 629, Title II, § 201, 70 Stat. 573.

UNITED STATES CODE TITLE 18

§ 1951. *Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family of of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of

property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Statement of the Case

Petitioner is presently a federal prisoner in the Federal Penitentiary, at Leavenworth, Kansas, having been convicted and sentenced for violating and conspiring to violate the Hobbs Act, 18 U.S.C. §1951 (interference with commerce by threats or violence.) A writ of habeas corpus was originally brought in the District of Kansas and was transferred to the court below pursuant to 28 U.S.C. §1404(a). The Petitioner is not challenging his present federal sentence, but contends that constitutional errors were committed in a prior state conviction upon which he is required to serve 3 to 6 years, commencing upon his relief from federal custody. Petitioner submits that these circumstances justify federal jurisdiction under the pending sentence doctrine of *Peyton* v. *Rowe*, 391 U.S. 55 (1968).

Petitioner contends that the following errors occurred in his state court trial:

1. Certain tape recorded evidence of a conversation

between a police officer and a co-conspirator was improperly admitted into evidence;

2. The jury failed to adhere to the rule of *Griffin* v. *California*, 380 U.S. 609 (1965).

By ruling dated July 14, 1971 and judgment dated July 23, 1971 the United States District Court for the District of Connecticut dismissed Petitioner's Petition for Writ of Habeas Corpus. Said ruling and judgment are reflected in the Appendix hereto annexed at pages 69-73. On July 26, 1971 a Certificate of Probable Cause was issued in accordance with which this appeal was effectuated. Said Certificate is also reflected in the Appendix hereto on Page .

On November 11, 1971 the Court Below, without opinion, affirmed the judgment of the District Court.

Reasons for Granting the Writ

I. The Trial Court's Charge Did Constitute a Comment upon Petitioner's Election Not to Testify.

The charge complained of is contained verbatim as "Questions Presented" numbered 1 appearing on page 2.

Appellant had requested the court to charge as follows, which request was denied:

"The defendant is not required to testify on his own behalf. The law gives him the right not to testify. Here the defendant, Ralph Tropiano, exercised his right not to testify. I instruct you that you must not consider the defendant's exercise of his right not to testify as evidence of guilt. You may draw no inference of any kind against the defendant because he did not testify."

The appellant respectfully refers this Honorable Court's attention to the following specific language of the given charge, upon which his claim of constitutional violation is predicated:

a) The jury was instructed that the Appellant had the right to testify, but in that he had the right *not* to testify. The prior statement that Appellant was "under no obligation to testify" does not, it is respectfully submitted, cure this defect for not being obliged to testify is clearly distinguishable from having the right not to so do. The former requires the conclusion that Appellant was not required to testify if he did not wish to, wherein the latter emphasizes his irrevocable right not to take the stand. The former is negative, the latter is positive.

b) The jury was instructed that no inference of any kind should be drawn against the Appellant because "he hasn't *undertaken* to testify" (emphasis supplied). Again, the failure to "undertake" to testify in his own behalf does not, it is respectfully submitted, adequately emphasize to the jury the Appellant's *right* not to testify. Once more, the negative aspect of Appellant's election was emphasized (I don't want to testify) as distinguished from his positive exercise of his constitutional right not to so do.

c) The jury was initially instructed that the state bore the burden of proof throughout the trial to prove the Appellant guilty. They were then instructed not to draw any inference of guilt "for the reason alone" that Appellant does not elect to testify "because . . . he is presumed to be innocent and the state has the burden of overcoming that presumption beyond a reasonable doubt." The jury was not told that they could infer no guilt from Appellant's election not to testify because he was exercising an irrevocable right not so to do. In substance, therefore, the jury was told, "Don't hold it against the Appellant that he does not take the stand because he is presumed to be innocent." It invites the conclusion that once this presumption of innocence should disappear in the minds of any juror he then would be entitled to consider the Appellant's election not to testify in his deliberation of guilt.

d) The words "for the reason alone" infer that the Appellant's election not to testify can be considered against him along with any other evidentiary factors the jury deems appropriate for consideration.

Thus, the Appellant contends that the substance of the trial court's charge in effect advised the jury that the only reason they could not consider Appellant's election not to testify was because of the presumption of innocence rather than the right not to take the stand which it is respectfully submitted, constituted a comment by the trial court on Appellant's failure to testify, thereby effectuating reversible error. *Griffin* v. *California*, supra; *U.S.* v. *DeLaCruz Bellinger*, 422 F.2d 723.

II. The Admission into Evidence of a Telephone Conversation Reflecting Declarations of a Police Officer Made to a Co-Conspirator Outside the Presence of a Defendant Does Constitute a Denial of Due Process.

There were admitted into evidence against Appellant-tape recordings between a police officer, not a member of the alleged conspiracy and a co-defendant and alleged co-conspirator, one DiBella. Appellant was not present at the time these recordings were effectuated. The transcript of these recording are reflected verbatim in the Appendix hereto on Page

An examination of this transcript reveals that the police officer had intentionally drawn from DiBella various derogatory statements regarding Appellant and that his purpose in so doing was to involve Appellant in the alleged conspiracy.

In its charge, the trial court correctly defined "conspiracy" and identified the alleged co-conspirators. Thereupon, the following charge was given:

"The declarations of a conspirator are admissible and are to be considered by you against a co-conspirator only if there is independent evidence of the existence of a conspiracy, and if the declaration is in furtherance of the conspiracy. However, when and if the State proves that he has become a member of the conspiracy, such declarations and acts of other conspirators or the commission of overt acts by other co-conspirators are his responsibility. But, he first has to be connected by the evidence to the conspiracy."

No portion of the charge made specific reference to the tape recordings.

The Connecticut Supreme Court justified the admission of this evidence on the ground that the statements of the police officer were admissible for the limited purpose of giving meaning and coherence to the statements of co-conspirator DiBella. That court stated, "Although Reynolds' part in the conversations was not admissible to prove the truth of any assertions made by him since he admittedly was not a co-conspirator nevertheless his portion of the conversation was admissible for the limited purpose of giving meaning and coherence to DiBella's statement."

The co-conspirator exception to the hearsay ruling does not allow the introduction of words or deeds of a government agent to an alleged co-conspirator out of the presence of the defendant. *U.S.* v. *Morello*, 250 F.2d 631 (2nd Cir., 1957); *Kramer* v. *U.S.*, 317 F.2d 114 (D.C. 1963). A defendant's connection with a conspiracy may not be established by extra-judicial statements of an alleged co-conspirator made out of the presence of the defendant. *Taylor* v. *U.S.*, 260 F.2d 737 (D.C. 1959); *Rodriguez* v. *U.S.*, 373 F.2d 17 (1967).

The trial court in its charge to the jury named the alleged co-conspirators (making no reference to the police officer with whom DiBella had conversed) and instructed that once

the Appellant had been proved to be a member of the conspiracy by other evidence, then the declarations of a co-conspirator were admissible against him. THE JURY WAS NOT INSTRUCTED TO DISREGARD THE POLICE OFFICER'S INCRIMINATING STATEMENTS WITH REGARD TO APPELLANT. Moreover, the Connecticut Supreme Court justification for the admission of the police officer's statements (to give meaning to the words of DiBella) was at no time alluded to in the charge to the jury.

Thus, the trial court in its charge:

a. Named the alleged co-conspirators.

b. Instructed that only the acts and declarations of said co-conspirators in furtherance of the conspiracy could be used against the Appellant.

c. Did not specifically instruct the jury that the police officer was not an alleged co-conspirator.

d. Did not specifically instruct the jury that the statements of the police officer could not be used against the Appellant.

e. Did not instruct the jury that the statements of the police officer could be considered only for the limited purpose of giving meaning to the words of co-conspirator DiBella.

Appellant contends that in view of the specific instructions given and in view of the absence of instructions with regard to the limited purpose of receiving the police officer's statements into evidence that the jury could not be expected to deduct and discern this limitation upon which the admission of the transcripts was predicated and that said jury did in fact consider the statements of the police officer as substantial evidence against the Appellant. This, it is respectfully submitted, constituted a violation of due process and reversible error.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

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APPENDIX

RALPH TROPIANO
v.
ROBERT I. MOSELEY, WARDEN
OF FEDERAL PENITENTIARY
LEAVENWORTH, KANSAS

1971

2/8 Certified Copy of Order of the United States District Court for the District of Kansas, transferring action to the United States District Court for the District of Connecticut; received and filed together with the following Papers:

(1) Petition for Writ of Habeas Corpus
(2) Memorandum and Order re verification of application
(3) Verified Petition for Writ of Habeas Corpus
(4) Verification of Petition for Writ of Habeas Corpus
(5) Memorandum and Order re issuance of Rule to Show Cause
(6) Rule to Show Cause
(7) Petitioner's Motion to Amend Petition for Writ of Habeas Corpus
(8) Order Granting Petitioner's Motion to Amend his Petition
(9) Respondent's Motion for Enlargement of Time to file Motions and Return
(10) Appearance of Jerrold H. Barnett for Respondent
(11) Order granting Attorney Jerrold H. Barnett permission to appear for respondent
(12) Order granting respondent's motion for

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enlargement of time to file motions and return

(13) Respondent's Motion for Change of Venue

(14) Respondent's Memorandum in Support of Motion for Change of Venue

(15) Memorandum and Order re memoranda and motion for an order transferring case to District of Connecticut

(16) Respondent's Supplemental Memorandum

(17) Copy of Docket Entries.

4/20 Respondent's Return together with Exhibits 1 thru 7, filed.

6/14 Hearing on Petition for a Writ of Habeas Corpus. "Over two weeks by agreement of counsel". Clarie, J. M-6/15/71.

6/28 Respondent's Memorandum, filed at Hartford.

" Hearing on Petition for a Writ of Habeas Corpus. Decision Reserved. Clarie, J. M-6/29/71.

7/15 Ruling on Petition for a Writ of Habeas Corpus, filed and entered. The application for a writ o habeas corpus is without merit and is therefore denied. So ORDERED. Clarie, J. M-7/15/71. Copies mailed to all counsel.

7/23 Notice of Appeal, filed by Plaintiff. Copies mailed to all counsel.

" Judgment entered in favor of respondent, dismissing the petition for a writ of habeas corpus. Earl; C. Copies mailed to all counsel.

7/27 Certificate of Probable Cause, entered. Clarie, J. M-7/27/71, Copies mailed to all counsel. Copy of Certificate, Notice of Appeal and Docket entries mailed to Clerk, U. S. Court of Appeals.

EXHIBIT Q
TRANSCRIPTION OF
TAPED TELEPHONE CONVERSATIONS
BETWEEN REYNOLDS AND DI BELLA
TAPE 1
(FEB. 10, 1964 AT 6:55 P.M.)

Francis: Hello.

Thomas: I just gotta go down there. They just gave me a call now —

Francis: Did you hear what happened down there?

Thomas: No, I don't know what happened.

Francis: Ah?

Thomas: I don't know what happened.

Francis: Yes.

Thomas: What'd they get?

Francis: I don't know — they got about twelve places, I guess. Did you talk to Tropiano today?

Thomas: No.

Francis: Well, they didn't hit him then, probably.

Thomas: I don't know, I didn't talk to him today, but I just got this call a few minutes ago.

Francis: Yes. Didn't they tell you?

Thomas: No, I didn't say anything. They wanted to see me down the highway now.

Francis: Cripes sakes. Well that's what we were telling you about.

Thomas: Yeh, I know it. I know it. I can't go with all this crap. I mean, I got — my job is for that other thing. Now, if these fellows don't keep their house in order that's not my fault. (Q-2)

Francis: Well, I mean, they can keep them in order if they want to do it the way we said before, you know?

Thomas: Yeh. Yeh.

See, I told them exactly — you know what I told them, I told them to move. They said "Why?" I said, "I don't

know why." I said, "When I used to get the orders to move, they gave me a hint, I changed everything around.

Francis: Yes. Yes.

Thomas: These fellows, they're negligent; they wait until the last minute. I mean, all I gotta do is have just one little hint. I don't care how big the man is or how small the man is. If a man told me, "Tont, that's enough," I'd move.

Francis: Yeh.

Well, do you think they're still gonna work with Steve or what?

Thomas: Oh, yeh, I think they will know because — I'll go down and find out what the story is and let you know. I don't know what it is. I'll find out. I'll go down there. That's what it must be, see — you hit them in the pocket book, and now everybody wakes up.

Francis: Oh, sure. Oh sure.

Thomas: I know, I know.

Francis: I just heard it on the radio, but I knew when it was coming. (Q-3)

Thomas: Twelve joints?

Francis: Yeh, around there.

Thomas: Yeh.

O.K.

Francis: O.K.?

Thomas: I'll let you know what happens.

Francis: When are you going to give me a buzz?

Thomas: Tomorrow night.

Francis: You're positive?

Thomas: Yeh. Yeh.

Francis: O.K., I'll sit tight then.

Thomas: Yeh. Right.

Francis: O.K.

Voice: The last message was recorded February 10th at 6:55 P.M.

(FEBRUARY 10, 1964 AT 8:30 P.M.)

Francis: Can I?

Thomas: Yeh.

Francis: Yeh. Can you?

Thomas: Yeh. Yeh, I'm in a pay station. Hold on a minute, Frank. Francis, you know what it was?

Francis: What happened?

Thomas: The guy that's gonna run the crap game they grabbed. (Q-4)

Francis: Who, Paul?

Thomas: Yeh.

Francis: No kidding.

Thomas: Yeh.

Francis: He's not the only one?

Thomas: He strands to blow his joint.

Francis: He's not the only one?

Thomas: No.

Francis: Huh?

Thomas: They don't care about anybody else.

Francis: Oh.

Thomas: But, here's the way it happened. Some guy came in —

Francis: Undercover?

Thomas: A copper, yes — the undercover guy came in and passed the bet to one of the cooks —

Francis: Yes.

Thomas: — and the next time they came in they wanted to give it to Paul and Paul says, "I don't take any bets around here," so they said they gave it to Soapy. So, he turned around and said to Soapy, "You know these fellows?" He says, "Yeh." He said, "They're all right." They gave him the bet, and Soapy is the one that took the bet and called it in.

Francis: Oh.

Thomas: Nothing — no papers, no slips or anything

that was handed between the undercover guy and (Q-5) Paul. Everything was by word of mouth. The undercover guy to Paul on one occasion, and he turned around and he told it to Soapy, and Soapy called up. Paul had nothing to do with it.

Now they gave him the warrant to bring him over on June 4th. Now, if this guy goes — they've got the table, they've got the place all set, Paul is set to go and he's all upset.

Francis: Well, do you think that Paulie would go, or do you think he'd just get fined?

Thomas: I don't follow you, Francis.

Francis: Well, in other words, are you afraid that he's going to go to jail or what?

Thomas: Well, I'm afraid he can't have anything like this happen. He's stands to get thrown out of his place, if the Liquor Commission finds out. It's a felony.

Francis: Cripe sakes. He should have known.

Thomas: Well —

Francis: Like you say, if there's already been a warrant —

Thomas: I mean, two guys for the same offense and they knock him out —

Francis: Well, he's got a lot of time yet, right? When is the court, two weeks, at least?

Thomas: Thursday to plea.

Francis: When? (Q-6)

Thomas: Thursday to plea.

Francis: Plea day would be Thursday —

Thomas: Yeh.

Francis: — right? He's gonna plead no guilty?

Thomas: Yeh.

Francis: Right?

Thomas: Yeh.

Francis: So that it would be at least two or three weeks before that, right?

Thomas: Yeh.

Francis: Well, he's got a lot of time, and I'd have to do some talking.

Thomas: You want me to do a little talking too?

Francis: Well, let me get—

Thomas: I think you're better off you doing it, Francis.

Francis: Well, I want to get the general feel first before we go, you know.

Thomas: Yeh. Because they're all set to go, they're gonna start Thursday.

Francis: Did you talk to Whitey yet?

Thomas: Whitey is still in bed. I met his men on the highway. He's still in bed; he's not feeling right.

Francis: You know the whole thing that's gonna make the difference here? (Q-7)

Thomas: What?

Francis: This kid still doesn't know whether you're putting him on.

Thomas: No.

Francis: This Whitey has gotta come up with the dough or he's not gonna play ball.

Thomas: Francis—

Francis: In other—

Thomas: — all you gotta do is gove the orders.

Francis: Huh?

Thomas: — what the orders were, the way the money's gonna go — what did Whitey tell you? You get the money?

Francis: No. He told me that the money will go from him to you to me to Steve.

Thomas: That's the way it's gonna go when he gives it. That's the way it goes.

Francis: But, when is he gonna give it? That's what —

Thomas: Money goes when these guys get started. Now,

this was — they were gonna start Thursday night. They got the spot — they were gonna tell me where the spot was tonight and then I was supposed to give you the name of the spot to give to —

Operator: It is now four minutes. Signal when you're through.

Thomas: I'll take care of it, operator. (Q-8)

Francis: Ah —

Thomas: Do a lot of talking. You can't get ahold of him tonight, huh?

Francis: No. It'd be better off if I called him during the day, then he gets it on his private phone.

Thomas: Yeh.

Francis: In other words, he doesn't like to talk in front of his wife.

Thomas: Yeh.

Francis: But, look, in other words, don't take a sweat on this about —

Thomas: No, no, no.

Francis: The whole bit here is he's got a lot of time. In other words, there's no rush —

Thomas: Yeh.

Francis: — that we gotta do it without thinking.

Thomas: And he's gonna plead not guilty, trial by jury, I figure. That's the best way, right?

Francis: Right. Right. In other words, then if something — we decide to change something in the interim, well, he can always change his mind there any time.

Thomas: If you pull this one, this is gonna make it awfully strong. You pull this one — it's very important. The whole thing hinges on this one.

Francis: Listen, I'm telling you the whole (Q-9) thing hings on the money. When the money —.

Thomas: Oh, the money. For Christ's sake, the money is the least thing. I can bring the money tomorrow.

Francis: Why don't you bring the money and show the kid?

Thomas: See.

Francis: At least — in other words, I haven't got anything to fall back on, Tom.

Thomas: All right, does he want a month's in advance?

Francis: He wants a month's in advance.

Thomas: All right. You'll have a month's in advance. In the meantime, you pull this one out of the hat. Make the other guy — make Soapy take the rap.

Francis: And don't forget —

Thomas: It's not fair to have two of them take it for one.

Francis: Don't forget pigeon here, too, in advance.

Thomas: Don't worry about you.

Francis: I'm worried about me.

Thomas: I'll take care of you. You got that four hundred, so you're in right off the bat. That goes the whole thing; it's two thousand dollars, right?

Francis: Right. Plus what's for me — you and I talked about.

Thomas: Yeh, on this end. (Q-10)

Francis: Right.

Thomas: That's right. We're not even moving yet, Francis. We've got a couple spots I want to talk to you about, that's why I wanted to sit down with you some night this week.

Francis: Yeh.

Thomas: Grab those four (inaudible.)

Now, does he want that money up before they move?

Francis: Well, I think it would give him a little bit of confidence.

Thomas: Would he feel better?

Francis: I know he will. That's what he's been harping at me at. I said, "Well, listen, the guy has been

talking," and I said, "but he's good for it." In other words, I told him you were good. You see, he doesn't know you, Tom.

Thomas: Yeh.

Francis: You understand?

Thomas: Yeh.

Francis: In other words, just like you really don't know him, really.

Thomas: Well, I'm not worried now. I'm not worried. If I sat down with (h)im I'd feel entirely different about the main.

Francis: Well, I think —

Thomas: All right, I'll get the (inaudible.) In the meantime — (Q-11)

Francis: You get that, I will talk to him, and can I — you see me tomorrow night?

Thomas: Yeh.

Francis: All right. Give me — well, I don't know how the hell I'm gonna do this, Tom. At least until — give me until six o'clock tomorrow night.

Thomas: All right.

Francis: And then —

Thomas: I'll be at my house at six o'clock tomorrow night waiting for a call.

Francis: At your house?

Thomas: Yeh.

Francis: All right.

Thomas: All right?

Francis: And I'll see what his feelings are; maybe he'll want to talk with you, then — like I say, it's up to him. I really don't know what the "poop" is yet.

Thomas: Yeh, yeh.

Francis: You just told me; that's all I heard.

Thomas: Yeh. The kid can't take that rap. If he takes that rap he blows that joint.

Francis: Yeh.

Thomas: Look, it's a felony, Francis.

Francis: Yeh, I know it.

Thomas: And it's bad. Now this is something he had started before; this is nothing — I was (Q-12) telling him about it. He's not to be (inaudible.) He said these kids — they were young Italian cops, they didn't know nothing about it. He never did business directly with them. It was the cook.

Francis: Yeh.

Thomas: Well —

Francis: In other words, there is somebody there — this Soapy can go the route?

Thomas: Oh, yes.

Francis: Let me talk to him.

Thomas: All right.

Francis: And then I'll explain it to you when I see you just what we think we should do.

Thomas: I'll be waiting for your call at my home.

Francis: O.K.?

Thomas: Yeh.

Francis: O.K.

Thomas: Goodnight, Francis.

Francis: Right.

Voice: This last recording was taken on February 10th at 8:30 P.M.

(FEBRUARY 11, 1964 AT 6:00 P.M.)

(Buzz.) (Buzz.) (Buzz.)

Thomas: Hello.

Francis: Hello. (Q-13)

Thomas: Yes.

Francis: Franny.

Thomas: Oh, yeh. Let me pick it up upstairs.

Francis: O.K.

(Pause.)

Thomas: Hi, Fran.
Francis: Hi, Tom.
Thomas: Good.
Francis: Time available tonight?
Thomas: Plenty of time.
Francis: Huh?
Thomas: Plenty.
Francis: Plenty of time?
Thomas: Yeh.
Francis: Where?
Thomas: Any place you say.
Francis: I don't care. Ollie's?
Thomas: Huh?
Francis: You ever go to that Ollie's?
Thomas: Ollie's?
Francis: Yeh. I never been there. I don't know.
Thomas: It's no good there.
Francis: Well, you name it.
Thomas: It's too obvious.
Francis: You name it.
Thomas: You gonna be alone?
Francis: Well, certainly. (Q-14)
Thomas: All right. Let's meet in our same spot. You leave your car there and we'll go in my car this time.
Francis: O.K.
Thomas: Same spot.
Francis: Not too long though.
Thomas: No.
Francis: Avon or something like that?
Thomas: Yeh.
Francis: All right.
You're talking about the phone booths?
Thomas: Yeh.
Francis: O.K. What time?
Thomas: Well, I just got home —

Francis: Me too.

Thomas: — and I'm not gonna get dressed because I —

Francis: That's all right. No, that's all right.

Thomas: — I got some company coming over tonight, and I want to help this guy across the street, the poor bastard. His washing machine went on the fritz and he can't afford a guy, so I told him I'd give him a hand tonight.

Francis: About seven o'clock? Seven thirty?

Thomas: Seven — quarter after seven — between quarter after seven and seven-thirty.

Francis: At the same place. (Q-15)

Thomas: Same spot.

Francis: O.K.

Thomas: Good boy.

Francis: O.K., Tom.

Thomas: By.

Francis: Right.

Voice: This last recording was made February 11th at 6. P.M.

(FEBRUARY 12, 1964 AT 9:45 A.M.)

Thomas: I thought you said you were gonna get up around quarter to nine, that's why I didn't bother you. It's quarter to ten, Frank?

Francis: Yeh.

Thomas: You know, do you suppose — now, this is — don't get excited about this. They want me to turn over the money, but they want — here's the only thing that they haven't got. They won't get nobody to come to the games on account of he has this thing over his head that long. To me — do you suppose he can knock it out entirely? He can't, huh, before then?

Francis: No.

Thomas: He can't?

Francis: They're asking for the moon.

Thomas: They can't do it, huh?

Francis: No.

Thomas: Well, here's what they told me. They told me they could pass the — they could pass one- (Q-16) half of the money over until after this thing goes, and they can't move until then. You know what I mean? To show that they're acting in good faith.

Francis: Well, like they said, this guy promised a month, and if this guy don't get a month he's through. I just know it.

Thomas: Yeh. See, how long do you think that they'll postpone that thing? Because this guy — you see, you follow me, Frank?

Francis: Oh, yeh, I can see.

Thomas: You follow my point? Because the guys he's gonna have coming in there, Frank, with this hanging over his head — I can see the point. When they brought it up I said, "Jesus, how the hell are you gonna do it? The only thing that you can do is you'll have to wait until after the thing gets started — after the case goes through. Now, how long these postponements are going to be I don't know." But, they were talking about — and it was a logical thing — in other words, if you got — I'm a businessman and I come over to your place to play, I want to rest assured that nothing gonna happen, no harm.

Francis: Yeh.

Thomas: And I think you would want your customers to feel it because you wouldn't be working — they wouldn't be happy with the situation.

Francis: Hey, listen, that wasn't even part of the bargain, Tom.

Thomas: Yeh, I know it. (Q-17)

Francis: And this kid's gonna tell 'em go jump in the river, I know.

Thomas: Yeh, yeh.

Yeh, that's right. I say the — I said the same thing.

Francis: If they don't want 'em let say so.

Thomas: Francis, where can I see you now, tonight?

Francis: Tonight?

Thomas: Yeh, about what time you want to see me?

Francis: Well, that's up to you.

Thomas: Yeh. Well, why don't I call you.

Francis: Because this is my day off.

Thomas: Oh, no, no. You probably want to go out, huh?

Francis: Yeh. You can call me, say, any time after three o'clock, I'll be home.

Thomas: All right. All right.

Francis: If they just put up half tell 'em to forget it.

Thomas: Yeh.

Francis: Because I know this kid. I'm not gonna argue with this kid.

Thomas: Yeh. Let me ask you something, Francis. You think you can get him on the phone today?

Francis: Me? (Q-18)

Thomas: Yeh.

Francis: I don't know — dangerous — I could try.

Thomas: Yeh.

Francis: I don't know.

Thomas: Ah —

Francis: Well, what do you want on the phone?

Thomas: Well —

Francis: What I just said?

Thomas: Yeh. Just exactly. See how long this thing — because they can't operate. That fellow can't be behind this stick with this thing over his head.

Francis: Sure he can.

Thomas: Huh?

Francis: I'm telling you now that it's taken care of.

Thomas: Yeh. Yeh, well, that's quite good. I wouldn't be afraid —

Francis: But, he's not going to make it obvious; that's the whole God damned thing in a nut shell.

Thomas: Yeh, hey.

Francis: And if you want to talk to the kid tomorrow night about it, then you can talk to him then about it.—

Thomas: Yeh.

Francis: — but I ain't — he won't even meet with you.

Thomas: Yeh, yeh, yeh. I know it. (Q-19)

Francis: But if they're just to put up half and fuck around with something like — it isn't even —

Thomas: — (Inaudible.)

Francis: He's gonna drop the whole fucking thing.

Thomas: Well, what I meant, Francis — this is the way they meant. They want — they're not gonna operate until Paulie's thing is done, because you can't have — in the event that something happens he'd have two charges over his head, you know what I mean; without one being taken care of he'd have another one over his head, because the gambling ain't too bad.

Francis: Yeh.

Thomas: That's the only thing that he's afraid — in the event that something should happen, instead of having one he'd have two.

Francis: Well, that's up to them. As I say, I told you the best way to do it, he doesn't have to worry, everything is gonna be fine, but —

Thomas: Well, how would you feel in his position? I mean, let me ask you that question?

Francis: If I got told what I just told you?

Thomas: Yeh.

Francis: I'd feel good.

Thomas: Me too.

Francis: I'd feel good. (Q-20)

Thomas: Me too.

All right, I'll call you Thursday night.

Francis: This guy could give you something probably more definite tomorrow night.

Thomas: Yeh, yeh, that's what I was figuring.

Francis: If they only come up with half he won't even see you. I'm telling you.

Thomas: Yeh.

Francis: Like I say, I've talked to him already.

Thomas: Yeh.

All right.

Francis? When —

Thomas: As far as I'm concerned, Francis, you see, there's a guy that's gonna go into a place. He gonna be going in there with a free mind.

Francis: They'll go in with a free mind.

Thomas: Huh?

Francis: They'll go in with a free mind.

Thomas: I would. I wouldn't be afraid of the deal.

Francis: They'll go in with a free mind.

Listen, they're just not sure that this kid's not going to do anything, and I'm telling you that the kid will do something.

Thomas: Yeh.

Francis: In fact, it's already been done. (Q-21)

Thomas? Oh, no, I don't mean that he would lie — he's not going to do anything as far as this case is concerned. I say, "Yes," I think they do go along with that too, but the only thing is that the customers — you see, customers have to feel free in their minds, that when they go there nothing is gonna happen. You want to see his bar last night. You want to see the difference in the bar. The place was empty.

Francis: Yeh.

Thomas: Oh, it was dead. There wasn't a soul in there. Even the policemen that used to come in there — routine —

lunch time — they didn't come in. It made a big, big difference.

Francis: Yeh.

Thomas: Well, I can understand. What the hell, it's only a temporary injection. I mean, that'll — it'll straighten itself out all right, but they were talking about the players. The players wouldn't be going in there with a free mind, and yet how the hell are you going to put it on the surface? You can't put it in the New Haven Herald and say, "Look, Paulie's job and all these responsibilities, he's O.K." You can't do that either.

Francis: Well, that I'm not worried about. If they don't want the game, they don't want anything, that's up to them. The whole bit here is that wasn't even involved in the bit.

Thomas: That's right. (Q-22)

Francis: — and when I go and tell this kid this he's gonna say, "Well, tell 'em to drop it — the whole thing."

Thomas: Yeh.

Francis: I mean, this kid's not playing for nothing.

Thomas: Yeh. Yeh, that's right. That's right.

Francis: Any way they want it. If they don't want 'em, say so, and he's out.

Thomas: Let me call you at three, Francis, all right? You'll be home right after three?

Francis: Well, yeh, I'll be home probably before three, but I'm just saying that to be safer.

Thomas: Around three?

Francis: Yeh.

Thomas: O.K., boy.

Francis: Good, Tom. I'm sure that's the way he's gonna feel.

Thomas: Well, that's the way I felt about it last night.

Francis: Maybe if they do come up with it, you see

him tomorrow night, maybe you can get something definite out of him, whether just throw it out or something else.

Thomas: Yeh.

Francis: I can't say it because he's got (Q-23) the contact there and he's close to it.

Thomas: Yeh, yeh, yeh.

Well, you know what I think personally? I think if the fucking dough had been up a week ago, I don't think the guy would have made the hit.

Francis: Oh, yeh, I think he would have had to.

Thomas: Yeh.

Francis: He'd have to.

Thomas: Forced to?

Francis: Sure these things have been in effect for a long time.

Thomas: Yeh, I know it, but I think he could have, proably worked something out —

Francis: Oh, well, sure. I mean, he could have lost a warrant, or said, "This one isn't too sure."

Thomas: Yeh, yeh. I think —

Francis: That's the best —

Thomas: Because I think the guy is that honorable.

Francis: That's what's gonna hurt him right now. They're dilly dallying around here about this money deal —

Thomas: No, they didn't discuss money. No, there was not discussions about the money. The money was perfect. Here's what — all they said was, "Look, as long as Paulie's case is being — have to wait until it's (Q-24) nolled — not nolled, but postponing it; let's give 'em half the money, we don't operate, and when the case is all finished then we come up with the other grand and they start business." You know what I mean, that's the way they want it. It wasn't that they were trying to cut you down and go into business. That isn't the point. They didn't want to operate.

Francis: Yeh.

Thomas: See what I mean?

Francis: What did he say he'd come up with?

Thomas: They want to come up with one-half of the money to show that they're acting in good faith. They don't operate until Paulie's case gets squared away, because they gotta get the people that are going to come to these cases free in their minds that nothing is gonna happen.

Francis: No, that's gonna cost him two grand or he's out.

Thomas: Yeh.

Francis: Like I say, this isn't me talking; that's him talking.

Thomas: Yeh, yeh.

Francis: Because, like I say, this kid just says, "Listen if they want it, they want it. If they don't tell 'em to forget it."

Thomas: Yeh, yeh.

Francis: So, it's up to them. Either (Q-25) they want the kid or they don't, and they gotta decide. This shouldn't even enter into it.

Thomas: That's right. That's exactly what I said. I said that the kid gave you the offers to go and you could go. So, I said to Paul, "Why do you have to be in there? Why do you have to be the sucker man?"

Francis: That's an answer too. They gotta make up their mind one way or the other.

Thomas: I said, "Why do you have to" —

Francis: They feel like talking and the kid's interested — I say if they don't come up with it let's forget about it.

Thomas: Because I can understand that the play is gone up there — the play is gone up there without a free mind — see, in Bridgeport they go in which a free mind. You don't have to worry — it's only twenty minutes away.

Francis: Yeh. Well, that's up to them. Listen, if they want him they got him. If they don't then tell 'em to forget it.

Thomas: Yeh. All right, Francis.

Francis: All right?

Thomas: Yeh.

Francis: Not half though.

Thomas: Oh, no, no. No. All right. That's all. You guys call the shots.

Francis: Not me. I'm not calling the shots. (Q-26)

Thomas: No. Yeh.

Francis: I haven't bothered you for my money.

Thomas: No, no.

Francis: All right. Like I say, this New Haven thing is something between Tropiano and—

Thomas: Who the hell was that kid—you know you were telling me about that kid over in that diner?

Francis: Kid over in the diner?

Thomas: You know the Puritan Maid, the one your kids was telling me about.

Francis: What about him?

Thomas: I was trying to figure out who the hell he is. Some guy picking up action in there?

Francis: Oh, you know there's somebody picking up action in there.

Thomas: No, I didn't. I don't hang around there, Frank.

Francis: Well, I'll talk about him later.

Thomas: O.K., boy.

Francis: Like I say, find out from these guys one way or the other.

Thomas: Oh, well, they want to go, Frank.

Francis: Well, it's up to them.

Thomas: They want to go, but they want to go with a free mind with the players. (Q27)

Francis: This New Haven is between Tropiano and Ahearn.

Thomas: Yeh.

Francis: Right?

Thomas: Yeh.

Francis: And if Tropiano wants him he's gotta come up with the dough irregardless of this last pinch to Paulie.

Thomas: Yeh.

Francis: And, on top of that, Ahearn is talking about helping Paulie out of this one too.

Thomas: Yeh. Yeh.

Francis: So if he hasn't got enough faith in him now tell him to forget it.

Thomas: Well, I have faith in him.

Francis: Well, I mean —

Thomas: "Would you go along?" And, I said, "Yes, I would go along — I would be there frequently but I wouldn't be there as a stick man."

Francis: Well, this Tropiano is pulling Ahearn's leg if you're asking me.

Thomas: I don't think so.

Francis: Well, he's gotta prove it.

Thomas: Yeh.

Francis: You know?

Thomas: Yeh. No, he's not a — gee, they were telling me — (Laughter) — that Joe Licardi bit one of the cop's fingers or something. (Q-28)

Francis: Well, that's — see, that's the guy that I heard they grabbed his nose to have him spit out the action.

Thomas: Yeh.

Francis: So, he probably did bite the cop's finger, I don't know.

Thomas: (Laughter) — telling me about it.

Francis: But, Tom, listen, if Tropiano wants to go with Ahearn tell him to come up with the money one month

and in advance, and if he doesn't want it tell to forget it.

Thomas: O.K.

Francis: I mean, you can't be any plainer than that.

Thomas: Oh, no, no, no, no. But the money part of it wasn't the issue.

Francis: Well, what do you mean — wants to give the kid half? He's acting like a baby for cripe sakes.

Thomas: Yeh. He wanted to give him half so that he would operate until the thing was clear.

Francis: He's talking like a baby.

Thomas: Yeh, yeh.

O.K. Frank.

Francis: All right?

You're gonna give me a buzz though for sure — (Q-29)

Thomas: Oh, definitely. Definitely.

Francis: O.K.

Thomas: All right.

Francis: But, you tell him that.

Thomas: All right, boy.

Francis: O.K.?

Thomas: Yeh.

Francis: Right, Tom.

Voice: This last recording was taken February 12th at 9:45 A.M. in the morning.

(February 12, 1964 at 1:30 P.M.)

Thomas: I got hold of one. I couldn't get hold of the other. Tell you what I gonna do. I'm gonna take it on myself — I'm gonna put the money up myself, then we'll talk.

Francis: Well, like I say, it's not me; it's him.

Thomas: (Inaudible)

Francis: If they want him —

Thomas: (Inaudible)

Francis: I don't know what the hell you're doing it for.

Thomas: Well, I know it. I know it. The whole thing —

you know what could happen? I was just discussing this with Freddie. Freddie and I are very close.

Francis: Yeh. Amaio, you mean? (Q-30)

Thomas: The thing could — that's why, like I said I'm gonna put it up and I'm going to — I did get from him, like I said before — I called him up this morning, and he said, "Look" — first, I told him I suggested the one half of it, but then let me put the whole fucking thing up, then on this one I'm gonna do this. Then I want Mr. Ahern to go through with his part of the bargain the way he did about the pinch, so that there won't be nothing going on — no operation going on until Paul is cleared. And after Paul is cleared I will divorce myself completely from him.

Francis: Yeh, well, that's good. I don't know what the hell you're going it for him anyway.

Thomas: Now, you follow me?

Francis: Yeh.

Thomas: Now, will he give me the same consideration with another outfit?

Francis: What do you mean?

Thomas: Somebody else, take Paul out of the picture?

Francis: Oh, yeh. I mean, you gotta talk that with him See, I can't talk for him, Tom.

Thomas: No. Well, can I bring that up tomorrow.

Francis: Certainly. You can bring up anything you want.

Thomas: All right. (Inaudible) Where can we meet tomorrow? What time do you want to go? That's (Q-31) why I'm calling you now a little early.

Francis: You're not gonna see me tonight?

Thomas: Well, I don't think it's important tonight. I think tomorrow's the day when we get the money, and we'll all go together. That's what you want, right?

Francis: I was gonna get him the money before I saw you and him together.

Thomas: Oh, oh, oh. Well, the banks are closed today. I called up the banks about fifteen minutes ago. I was gonna get that part of it. I was gonna get that. I forgot about that, really. But the first thing in the morning I can do it.

Francis: Yeh, but then I'm unavailable; I gotta work tomorrow.

Thomas: Oh, I see.

Francis: This is gonna blow the whole deal. I gotta — I can't take off tomorrow. I can't make it looks as if —

Thomas: Oh, you were gonna sneak down there today?

Frank: Well, I'm not gonna say that we were gonna get it to him.

Thomas: Yeh, I know; that's your business.

Well, why don't we do this, Frank? Some way tomorrow — is there some way that probably he could meet you part of the way? Maybe you could sneak away from your partner tomorrow? (Q-32)

Francis: Then we're starting to take the chances, and you know this is foolish. We don't have to. Do you understand?

Thomas: Yeh.

Francis: Why do something foolish when it's unnecessary.

Thomas: Well, I just got through about fifteen minutes ago — I'm right on the highway.

Francis: Yeh.

Thomas: I just got through calling the bank to get the package ready for me, and the Goddam(n) — I could — it ring, and it ring, and ringing and ringing and finally I dropped the coin in — did you know the banks were closed today?

Francis: No, I didn't even think of it, to tell you the truth.

Thomas: I never believed this — I didn't — I couldn't figure out on account of Ash Wednesday. Yeh. And I only

got probably six, seven or eight hundred — a thousand tops around the house. Then I'd have it get it broke up in bills.

Francis: Why can't this guy be — in New Haven put up the grand — the other grand?

Thomas: Ah —

Francis: The guy that's going to put up the other grand.

Thomas: Then I'd have to go all the way (Q-33) down to New Haven. I'm fucking sick and tired of going back and forth, back and forth.

Well, you're gonna be home for a while. I'll call you again in about a half an hour. Let me see if I can pick up another "G" note somewhere from somebody.

Francis: O.K.

Thomas: All right.

Francis: I've already — listen —

Thomas: Yeh.

Francis: — I've already talked to the kid.

Thomas: Yeh.

Francis: He's in good spirits, this kid. And I told him maybe tomorrow night. Now, you say you would like to. Like I said, this business about this other stuff, I don't know what you're talking about. You just talk him and lay it on the line.

Thomas: Well, yeh, that's what I mean. I mean, we'll come up with the money, Frank.

Francis: That's right.

Thomas: Now, we don't operate, and he'll have to give us — you know, give us credit. I mean he can't get — use the money that we give him now for a month because we're not operating, right?

Francis: That's right. Well, you talk to him — that deal over with him. He'll play ball with you.

Thomas: I know he will. (Q-34)

Francis: As long as they — as long as he's sure they're playing ball with him and they're not gonna screw him in New Haven he'll go 100 per cent with you.

Thomas: Francis, he's got — look, he's got to depend entirely upon me and you.

Francis: Good.

Thomas: That's all I give fuck about, because I'm gonna come up with the end of it —

Francis: You come up with the end of it and he'll —

Thomas: They should be coming up here with me. I told 'em, let me be half way — I can't be going down there all the time.

Francis: Listen, you said that you've got the influence over these bastards. You call them up and tell them what the hell you want.

Thomas: Well, you see, I couldn't get ahold of Whitney. Whitey was (inaudible). I can't get ahold of him. I called the food place, I called his wife and his wife told me, "Tom, he left around twenty minutes after eleven this morning."

Thomas: And I'm on the highway, and I'll be here for another half or three-quarters of an hour to meet this — see if I can grab a thousand on the highway from somebody.

Francis: See what you can do. Give me a (Q-35) call back, and I'm sure you and him will have a very interesting talk tomorrow.

Thomas: All right.

Francis: O.K.?

Thomas: O.K.

Francis: O.K., Tom.

Voice: This last recording was made on February 12th at 1:30 P.M.

TAPE 2

(February 12, 1964 at 4:13 P.M.)

(Buzz.)

Francis: I was just talking to my mother.

Thomas: Oh, were you?

Francis: Yeh.

Thomas: Hey —

Francis: That's a long half hour I'll tell you.

Thomas: Who, me?

Francis: Yeh.

Thomas: Yeh, well, I'm trying to get some cash around, Francis. I got checks, but I can't — I got about thirteen or fourteen hundred in cash, that's all. I got plenty of checks and the fucking banks are closed and I've been on that highway and since that holdup nobody wants to keep any money. (Q-36)

Francis: No kidding?

Thomas: Yeh.

Francis: Can you get fifteen hundred?

Thomas: Oh, I probably could.

Francis: And get me the other five tomorrow?

Thomas: Sure.

See, that's what I was gonna figure. I figured you're gonna go down and see him tonight?

Francis: Well, like I said, I meet him somewhere and I don't want anybody to —

Thomas: That's your business. You do it — why in hell don't you do it tomorrow. I'll give you the whole God dam(n) thing early in the morning.

Francis: I can't do it tomorrow.

Thomas: Oh, yeh, tomorrow you work.

Francis: I can't do it.

Can you get me the fifteen hundred now?

Thomas: Well, yeh. I gotta go back over the house now,

and I'm going down to pick up the rest of this cash, and I drop back at the house.

Francis: Where can I meet you?

Thomas: Ah —

Francis: Or when and where?

Thomas: — give me —

Francis: It'd take two minutes.

Thomas: See, it's quarter after four now. About quarter to five? (Q-37)

Francis: Quarter to five. You say where.

Thomas: Go to that same spot again. That's a good spot.

Francis: You know where the bowling alley is?

Thomas: Yes.

Francis: Well, it's pretty crowded now and we won't be there too long anyway.

Thomas: No.

Francis: I just don't like using my car because I'm afraid the guy are gonna see —

Thomas: Well, we ain't gonna go anywhere are we?

Francis: No, I'd just as soon not, to tell you the truth.

Thomas: Where are the hell are we gonna go? I just give you this money and you go.

Francis: O.K.

Quarter to five over at the place.

Thomas: Yeh, because I'm leaving — I'm in Elmwood now. I've been trying to get you now for around fifteen minutes. You've been having quite a (inaudible) with your mother.

Francis: No, no.

Thomas: No?

Francis: Oh, no. Christ sake, two minutes.

Thomas: Well, coming back and forth —

Francis: In fact, the only thing she (Q-38) asked me was if I went to church this morning. So, we didn't talk that long.

Thomas: What time are you gonna see him tomorrow, Frank? We gonna see him tomorrow night?

Francis: Well, what's good for you?

Thomas: Well, any time is good for me.

Francis: He said, what's good for him it would be after seven anywhere.

Thomas: Oh, I don't care.

Francis: All right, because he's got to eat with the wife and all that —

Thomas: That's right. That's right.

Francis: He's a family man, you know.

Thomas: You know the place to go, down to Walter's.

Francis: Down to Walter's?

Thomas: Yeh, that's a beautiful place. We'll meet him at 67 — at 66. We can talk at the 66 Exit and —

Francis: Can I get a pencil?

Thomas: Huh?

Francis: Let me get a pencil.

Thomas: That's not important. All he does is get off at the Yankee Silversmith — the Exit of the Yankee Silversmith. That's Exit 66.

Francis: Yeh.

Thomas: You know where the Yale Motel is? (Q-39)

Francis: Right.

Thomas: He gets off the highway there and he goes into the Yankee Silversmith yard. He can see us coming down the hill when we get off.

Francis: Meet him at the Yankee Silversmith?

Thomas: Yeh. Let him be in the parking lot, then he can watch us coming off the highway.

Francis: That sounds good.

Thomas: Perfect — right down to Walter's — and there's nobody there.

Francis: Sounds good.

What time now shall I tell him?

Thomas: Well, you make the date. Whatever date you make with him is perfectly all right with me.

Francis: O.K. That's better because —

Thomas: I'll see you — quarter after four. Give me about quarter of five and five o'clock.

Francis: All right, I'll be over.

Thomas: All right.

Francis: I'll have my — well, I guess I'll have my car. She'll be home by then.

Thomas: All right.

Francis: O.K.

Thomas: Yeh.

Francis: O.K.

Voice: The last recording was made on (Q-40) February 12th at approximately 4:43 P.M.

(February 16, 1964 at 6:20 P.M.)

Francis: Hello.

Thomas: Francis?

Francis: Yeh.

Thomas: You having lunch — dinner?

Francis: No, no. I was taking a little nap.

Thomas: Oh, Christ, I told her not to bother you.

Francis: No, that's all right. She wants me to get up anyway. We're going over to play cards.

Thomas: Oh. You know, I made that call yesterday, did you hear from him?

Francis: No.

Thomas: Well —

Francis: How did you make out. I didn't even know what he wanted. Something about talking —

Thomas: Yeh. Well, he's deviating, Francis, you know? Remember I said, "I don't give a shit what happens to the other two guys."

Francis: What other two?

Thomas: Soapy and his brother.

Francis: Yeh.

Thomas: And the other guy?

Francis: Yeh.

Thomas: Joe?" (Q-41)

Francis: Yeh.

Thomas: I said "Just concentrate on Paul."

Francis: Yeh."

Thomas: That was the way we set it, you know? And he says, "Well, that's fine." Now, what he wants the other two guys — he wants to use them as the sacrificial lamb for Paulie, and the guy — it's no good that way.

Francis: Well, like I say, whatever way. That doesn't have to be either. What he's thinking about is experience — you know, to hurry it up.

Thomas: Oh, you see, it makes it looks as though — you know, there's a lot of honor between the brothers. It's just like saying —

Francis: Oh, sure.

Thomas: You know what I mean?

Francis: Or, sure.

Thomas: You understand. He said, "Jesus, you think he meant it that way?!" I said, "I don't think so," I said, "I don't think he would want to do it one way and have you deviate from it another way." He said, "Well, that's what he told me."

Francis: Are you sure you got it right?

Thomas: Yeh.

Francis: Because it doesn't sound right to me either.

Thomas: Huh? (Q-42)

Francis: It doesn't sound right to me either.

Thomas: Oh, I don't know, but see, that's what Paul told me.

Francis: No, he wouldn't do that.

Thomas: You know, the guy is an awful stupid guy — them guys — Paul.

Francis: Yeh.

Thomas: You see, they don't know to — this thing is a shock to them. Do you understand? You remember I told you, Frank?

Francis: Yes.

Thomas: Believe me, it's a shock.

Francis: Yeh.

Thomas: And it's a hard thing to believe, see?

Francis: Yeh.

Thomas: And these guys get all confused. Actually I don't think it was a good idea for me to have him talk to them. I should have just handled it myself because I can talk with a free mind where he's nervous, see.

Francis: Maybe Paulie got it wrong, because I'll tell you it doesn't sound like him at all. I know he wouldn't do something like that.

Thomas: Well —

Francis: He's not that type of an individual. (Q-43)

Thomas: I don't like to call him because — you call him, it would be better. Not today — tonight.

Francis: Well, I'll get in touch with him tomorrow.

Thomas: Take your time. Yeh, it's not that important. I just — I got a little bit tied up looking around at a couple of spots, and my place fell through here; the office fell through here.

Francis: Where?

Thomas: Oh, that fucking office out there. Christ, by the time we clean it up, Francis — see, he left it like a pig —

Francis: Oh, you mean —

Thomas: — farm. It'd be a hell of a spot though.

Francis: Yeh. Oh, and how.

Thomas: I like the God damned thing, you know.

Francis: You mean the ranch?

Thomas: Sure, I'm looking around for a package store for ourself here, you know.

Francis: Around here?

Thomas: Sure. What the hell, I figured down there is all right too, but what do you think?

Francis: You know, it's fantastic. When you said that price that you'd make in a year —

Thomas: Oh, well —

Francis: — I thought it — (Q-44).

Thomas: I mean — I mean — you know what I mean, Francis. He was asking me how much business you could do.

Francis: Yeh, that's what I mean.

Thomas: Oh, yeh, business wise, but that isn't the end.

Francis: Yeh.

Thomas: The end is — oh, Christ sakes, better than half of it.

Francis: Is that right?

Thomas: Oh, sure.

Francis: That's fantastic. Unbelievable.

Thomas: Oh, I know.

Francis: Oh, I know. I suppose you would know I mean, I wouldn't know something like that.

Thomas: Well —

Francis: I'm sure that —

Thomas: Well, the way he told me was that he wants me — he wants the other two guys to cop a plea for me — put me up as the — the other guy's got his own. He's got a son going to Georgetown.

Francis: Yeh.

Thomas: To be a lawyer. He's all disappointed anyway.

Francis: Well, they're probably going to cop a plea anyway.

Thomas: I don't know what they're gonna do. He thinks — the other guy thinks he can beat this, (Q-45) that other guy. I don't know. That's his own mind. Let him worry.

about that. I don't want to get involved, and it wasn't our part of the bargain, and I think Mr. Ahern did a hell of a job in getting — doing things for Paul like he is.

Francis: Yeh.

Thomas: That's why I didn't want to get into that other thing. Let them worry about themselves, and I sold them on that idea. I said, "What the hell do I care about that? That's wasn't part of the deal." See.

Francis: Yeh. Well, I'll talk to the kid anyway, and —

Thomas: Well —

Francis: You're sure he's not doing it to hurt anybody else?

Thomas: Yeh. Well, I know in my mind what you told me, and I think that that's the way we ought to go through with it.

Francis: Yeh.

Thomas: He's got this guy Jacobs — who the hell ever he is — and he must be a guy like Hymie Olman (sic.) around here —

Francis: He's an attorney.

Thomas: He's got the office, yeh?

Francis: Yeh.

Thomas: We're working on a state guy now, Frank. Worked on him this afternoon.

Francis: Oh, yeh? (Q-46)

Thomas: I worked on him this afternoon.

Francis: That good?

Thomas: Well it could be. It could be very —

Francis: That's where you gotta be careful.

Thomas: Well — because I ain't gonna — we ain't gonna tip our hand.

Francis: Yeh, well, that's what I mean.

Thomas: No, we're only gonna ask it for one spot — on the highway.

Francis: Are you sure he's not gonna go anywhere?

Thomas: No, we're gonna make sure that he gonna let the beavers go on the highway.

Francis: Jimmy?

Thomas: Jimmy. Yeh.

Francis: Ah, you say "we." Who, you and Freddie Amaio?

Thomas: Yeh.

Francis: He seems like a very nice guy. I can't believe that he's younger than you though.

Thomas: Oh, yeh.

Francis: Next time I see him I'm gonna ask him.

Thomas: Yeh, he is. He's five — five or six years younger than me. Five year anyway.

Francis: Jimmy a good worker? (Q-47)

Thomas: Jimmy?

Francis: Yeh.

Thomas: Oh, he's got a lot of class.

Francis: Yeh.

Thomas: Well, he had all of them big shot business men down on the highway.

Francis: Yeh.

Thomas: They all like Jimmy.

See, right now he's tied in with — he's working with Joe Matarese — he's his front man for him, you know?

Thomas: Maitre de like —

Francis: It sounds like it's a far-off deal, right?

Thomas: Huh?

Francis: It sounds like our deal is a pretty far-off deal.

Thomas: No. Oh, no, no, no. Our's is coming along good, Francis.

Francis: It is?

Thomas: (Inaudible)

Francis: Yeh?

Thomas: We can work — even if we don't wind up

with nothing for six months, as long as we take care —

Francis: That's right.

Thomas: Because our's will take care of (Q-48) you all the time. We got something for you.

Francis: We'll make our's off of Tropiano.

Thomas: No. Well, you — for you I don't give a shit,

Francis: (Laughter).

Thomas: We'll take — you gotta chop it out anyway.

Francis: Yeh.

Thomas: You gotta chop it out. We'll just let — just let —

Francis: How does he feel? Is he gonna run or what do you think?

Thomas: Well, you see. Whitey — nobody is ever(y) gonna catch him. Whitey is got operations going that he ain't got no part of himself and they're runnings because no matter how many times they catch his men his men are — they'll die.

Francis: That's true. Oh, hey, sure.

Thomas: They'll go down. That's why his operation —

Francis: The games, I mean.

Thomas: Then he's got the priests on his side. He goes for fifty or sixty dollars a week just for — on fruits and (b)egetables for down there, and mushrooms and — oh, meats, and Christ's sake, it's a steady thing.

Francis: Who, to the priests you mean? (Q-49)

Thomas: No. For the poor; poor families and everything else.

Francis: Oh, yeh.

Thomas: And the church — Christ's sake, he can't do nothing wrong, you see, because nobody could put the finger on him.

Francis: Yeh.

Thomas: And with the operation going — and he don't stand for any crookedness, you know.

Francis: No, I don't blame him. You always get jammed up that way.

Thomas: Oh, yeh. He goes good, and, of course —

Francis: I mean about the game.

Thomas: Oh, the game is gotta be right. If it ain't right he don't want it.

Francis: I mean, does he think it's gonna go?

Thomas: Oh, yes, it could be the biggest thing around here if — he just don't think it's gonna go, and he think that Steve wants to trap him, and that still he ain't gonna get that out of his mind. But, you see, that mind is trained that way. See, that's trained way, way back that way, Francis.

Francis: Yeh.

Thomas: Don't believe even your brother.

Francis: Yeh.

Thomas: See? (Q-50)

Francis: What the hell can he do to prove it?

Thomas: Nothing. He don't have to do nothing. All he's gotta do is just go along with his end and it will take time to marry him.

Francis: Yeh.

Thomas: He could go on indefinitely, and he won't marry him, but he'll say, "You did a fantastic job," and all he wants to do is put ten cents in and he wants to get ten cents out. So —

Francis: Yeh.,

Thomas: — you can never tell whether it's part of his operation. But, without him the town don't run.

Francis: No.

Thomas: When Paulie starts Bridgeport shuts right down.

Francis: Yeh.

Thomas: I know that will shut down up as far as Norwalk.

Thomas: Oh, sure.

Francis: Well, in other words, you think Tropiano is looking to have the game though?

Thomas: Oh, I know that. It's gonna go. It's gonna go.

Francis: In other words, he trusts Ahearn that much anyway? (Q-51)

Thomas: Well, Paulie and me have to trust him, see?

Francis: Yeh.

Thomas: Even though he says, "I don't know how in hell you guys are doing it," but "you ain't gonna catch me going in there." He won't even walk into that thing — it will be months and months before he even walks in.

Francis: No kidding.

Thomas: That's right. He'll — he'll honor Mr. Ahern in his own particular way — it'll be a crude way — he'll say "I don't know — you know what he wants, he's waiting for me to get myself off guard, but he ain't gonna catch me."

Francis: Yeh.

Thomas: That's what's in his mind and you ain't gonna change it.

Francis: No.

Thomas: But, I know that he feels entirely different towards the whole situation, and I think he'll feel a hell of a lot better when Paulie's deal is out, because Paul is the Godfather to his two kids, do you see?

Francis: Yeh.

Thomas: And he feels bad about it, see. But, actually, when one cries the other will cry, but I think that Paulie is — he's a worrier, and he's no good the way he is right now, and I know — (Q-52)

Francis: As far as you're concerned —

Thomas: It's gonna go. It's gonna go. I know it.

Francis: — Tropiano hasn't backed out on the deal?

Thomas: No, no, no, no, no, I know that.

Francis: All right.

Thomas: No, I know that. It's wonderful. You just — don't make it too complicated. Tell him Paulie explained it this way to Tom and he was wondering if that's the way it was, because originally that wasn't what I told him. You know?

Francis: Yeh.

Thomas: So, don't make it so that it's too complicated, and I'll contact you tomorrow — tomorrow night.

Francis: No, I'll be working tomorrow night.

Thomas: That's right. Daytime.

Francis: Yeh.

Thomas: All right, I'll call you Tuesday.

Francis: Look, if you don't get ahold of me tomorrow give a buzz Tuesday morning.

Thomas: Yeh. Tuesday after eight o'clock.

Francis: Yeh.

Thomas: All right.

Francis: O.K.?

Thomas: Goodnight. (Q-53)

Francis: Right, Tommy.

Voice: The last recording was made on February 16th at approximately 6:20 P.M.

(February 18, 1964 at 12:45 P.M.)

Francis: Hello.

Thomas: Frank?

Francis: Yeh, who's this?

Thomas: Tommy.

Francis: Oh, Christ, I couldn't figure who the hell it was. I thought it was my brother or something.

Thomas: No. I had to go to New Britain and I'm on my way in. I'm all free.

Francis: Yeh.

Thomas: If you can sneak away I'll meet you somewhere.

Francis: How about Sears Roebuck?

Thomas: Ah —

Francis: There's a lot of cars.

Thomas: Why don't you keep it closer to your end down there — down in back of Casey's. Is that any good?

Francis: Back of where?

Thomas: Back of the — Tony Cacasey's (sic) place, what's that, no good?

Francis: Oh, that's all right. That would be all right. Anywhere you say. It's immaterial to (Q-54) me.

Thomas: That's all right. I'm coming in from New Britain.

Francis: O.K. In back of the Fernwood?

Thomas: Right in back of the Fernwood. O.K.

Francis: O.K.

Thomas: All right. I'm just leaving now.

Francis: O.K. Tom. Right.

Voice; The last recording was made February 18th at 12:45 P.M.

(February 19, 1964 at 9:30 A.M.)

Thomas: What time tomorrow?

Francis: What time tomorrow?

Thomas: Yeh.

Francis: Tomorrow night?

Thomas: You said Thursday.

Francis: Well, it's up to you; I don't care.

Thomas: Well, what time you say. You said to do it, so I did.

Francis: And would he make it?

Thomas: Yeh.

Francis: Any time you say is all right with me.

Thomas: All right, then, I'll have to (Q-55) contact him sometime today or tomorrow morning.

Francis: Find out anything good or bad?

Thomas: Well, I was more interested in my thing over here —

Francis: That's what I mean.

Thomas: I was talking to this cop after he got through. I figured he worked on your shift.

Francis: Yeh.

Thomas: He was over in West Hartford he told me in the bank and he heard this. Over at the West Hartford Trust here.

Francis: Did you talk to the cop last night?

Thomas: Yeh. He says he doesn't know whether — the guy told him he didn't know whether it was state now or the Treasury Department guys —

Francis: Well, Jesus Christ, if it was a cop he'd know whether it was West Hartford or not.

Thomas: Well, the fellows weren't in plain clothes or anything, and the guy was a little bit confused I guess. I don't know. I ain't gonna get upset about the God damned thing. I'm gonna wait until it happens. The hell with it.

Francis: Well, boy, I've been doing an awful lot of thinking.

Thomas: Well, —

Francis: You must be doing it too?

Thomas: Well, I don't have to think that (Q-56) much.

Francis: Just like you said, the amount is what bothers me. Just like you said —

Thomas: Nothing bothers me that way, Francis.

Francis: Huh?

Thomas: Nothing bothers me that way. That isn't what I — I'm just thinking of the guy that I'm breaking bread with. That's what I keep thinking about all the time.

Francis: How about —

Thomas: That —

Francis: How about Rush, are you going to go see him? Maybe he can give you an answer that might help us, I don't know.

Thomas: I don't know. I don't know. I don't like to go in and involve anybody.

Francis: If it happened a month ago or two months from now that'd be different, but that particular time — that's what bugging me.

Thomas: Well, I ain't gonna get alarmed about it. I'm gonna wait until it happens. Like I said before, what the hell, I go — a lot of times I run in and lots of times Joe Hennesy gets, for Christ's sake, fifteen hundred, two thousand dollars worth of checks. What the hell, I don't have it always, always all the time, you know, the cash.

Francis: Yeh, but — (Q-57)

Thomas: I run up for a week or ten days, you know, and pick it up —

Francis: The whole bit here is why would they want a check? That's what I can't —

Thomas: I don't know.

Francis: The only thing I can see is the ranch, and that's — like I say, I thought that that was a dead issue.

Thomas: This kid — this kid now, the way he said last night, he said, "I don't know whether the guy" — I didn't want to have him call the guy up because it would make it look too obvious, so I said, "What did he tell you?" "Well," he says, "He first said that he thought it was West Hartford cops and state cops."

Francis: In other words, this is the cop that asked the guy in the bank?

Thomas: No, this guy says to him — you know, this guy must come over the place, whoever they are that come over the Cyprus, I guess, to dance or drink or something.

Francis: Yeh.

Thomas: Because there must have been some cops over here investigating Mr. DiBella (sic). That's how it started.

Francis: Oh, over at the place they were checking?

Thomas: Where?

Francis: At the Cyprus? (Q-58)

Thomas: No, no. This guy — these people that must work over there must stop at the Cyprus.

Francis: Oh.

Thomas: And the guy come in there with the girls, I guess. I mean (inaudible) — they were going through my records. That's how I got it.

Francis: Oh.

Thomas: So, this kid happened to go over there and cash a check or something, and he said the guy called him, and told him — they're friends — this is a young cop.

Francis: You don't know who the cop is?

Thomas: Yeh, sure I know him.

Francis: Do you think it'd do me any good to do any checking?

Thomas: Pardon?

Francis: Do you think it'd do any good to do any checking?

Thomas: No, he ain't that — I don't think he's that —

Francis: In other words, if I knew the cop maybe he'd start talking to me.

Thomas: I don't know. I'll think it over. In the meantime, I'll set this up sometime for tomorrow night then.

Francis: You don't think Whitey's changed his mind? If he found out about this I suppose he would. (Q-59)

Thomas: Yeh, he probably would. He probably would.

Francis: Jesus Christ —

Thomas: I don't see how this should have any bearing on it though.

Francis: Oh, well, Jesus Christ, it has a lot of bearing on me.

Thomas: Well, we'll see. I can let you know a little later on. I'll set it up for tomorrow anyway.

Francis: Either during the day or —

Thomas: Well, it'll be in the evening, like you say. You said tomorrow night.

Francis: All right. Yeh, that's all right.

Thomas: See.

Francis: That's all right.

Thomas: That will give you a better chance. At least you'll be home with your wife when she comes home and then you can sneak out for a couple hours.

Francis: Yeh.

Thomas: All right, Francis.

Francis: In other words, you don't think we have any sweat with this thing or what?

Thomas: In which way, Frank?

Francis: Hey, listen, like I say, I don't like it myself.

Thomas: Well, I mean, the thing is — the pistol is pointed towards me right now. (Q-60)

Francis: Yeh, but if the pistol is pointed towards —

Thomas: I'm not worried about it because it's nothing I'm gonna worry about. I mean, I'm not worried about it.

Francis: Well, you seem more at ease today than you were yesterday. Yesterday you were worried about it.

Thomas: Well, like it came to me as a complete shock yesterday. And then I got it a little straighter last night with this kid.

Francis: I wish to hell I knew who that kid was.

Thomas: I do a lot of friends — I do a lot of favors for people; I don't ask them for nothing. And, the least they can do is — I think that guy up there watches me.

Francis: If I could find out the cop and I could start bullshitting with him somehow, then check and see why — that's all I want to know, why. I don't give a God damn who.

Thomas: Yeh, but that wouldn't prove anything.

Francis: Yes, if I find out who, I'd find out why.

Thomas: Well, we oughta find out, if we could find out, who went over there then we'd know.

Francis: That's what I mean. If I could (Q-61) just find out who the hell went over there.

Thomas: Well, I don't think he knows, because I think — I don't think the guy knew, because, like he said, he didn't know whether it was Treasury men or state men or—

Francis: Well, you told me yesterday it was definitely the West Hartford Police.

Thomas: They are. He said yesterday he was — like I told you last night, and I said, "Well, how" — (Inaudible) — now he saw him again after.

Francis: Yeh.

Thomas: And after the guy gets out of work, that's what I'll do.

Francis: Boy, I did a lot of thinking last night, I'll tell you.

Thomas: Well, I — if what's his name was on the ball last night he would have found him.

Francis: Who?

Thomas: Your man "Baker."

Francis: Baker?

Thomas: Yeh.

Francis: What do you mean, Baker?

Thomas: He just left him.

Francis: You just left him?

Thomas: I just left him and Baker popped in.

Francis: You just left him and Baker just popped in? (Q-62)

Thomas: Yeh.

Francis: Where the hell were you?

Thomas: Well, I was just coming back from the north end — Tony Nigro was stuck with a flat tire on (Inaudible) —

Francis: Yeh.

Thomas: And he asked me if I'd take him to New Britain. I said, "Yes." So, we stopped and had a cup of coffee.

Francis: Oh, I know where you were; you were at the Toddle House.

Thomas: Yes.

Francis: He was picking up a hamburg for me. You were in there?

Thomas: Yup. It was about —

Francis: Twelve o'clock.

Thomas: Twelve o'clock, yeh.

Francis: Yeh.

And you were there?

Thomas: Yeh.

Francis: Jesus Christ, I wish I knew you were there.

Thomas: Well, I was right there. He looks good, Johnny.

Francis: Johnny is all right.

Thomas: He make a handsome voice. He's thinning out, I think.

Francis: No, he's still got a lot of weight. (Q-63)

Thomas: Yeh.

Francis: He's still got a lot of weight.

In other words, the cop was there then?

Thomas: Nope. Just left a few minutes before.

Francis: You don't want to tell me who the cop is?

Thomas: Right at this moment, Frankie, I can't. He's the guy that Christ sent down to me.

Francis: Yeh, but he's gotta help me too. I'm in it just as deep as you are. True?

Thomas: Well, we'll see, Francis. We'll see. We'll — I can perform.

Francis: Well, I hope you can. Like I say, if you can take this sweat away I'd appreciate it, I'll tell you — if you find out for sure.

Thomas: I will.

Francis: I don't like it. It don't go right with me.

Thomas: O.K. I'll set it up. I'll call you tomorrow anyway.

Francis: Did you call Whitey regards that attorney?

Thomas: Who? Oh, yeh, I did what you told me. You know that, when I went to that phone, after I dropped you.

Francis: Yeh. Well, I'd like to see (Q-64) what happens there too. That ought to be interesting.

Thomas: Yeh.

Francis: Are you gonna give me a buzz?

Thomas: Yeh.

Francis: O.K.

Thomas: O.K.

Francis: O.K.

Thomas: Hey, what happened on your street there last night? The water main broke?

Francis: Yeh.

Thomas: Well, I went down — I was coming back, you know, and I was going down that way, you know, and, Jesus, there was nobody around and water was coming out of there a mile a minute, and there was no crews or nothing. It must have just broke when I got by there.

Francis: Did you report it?

Thomas: No.

Francis: I heard him send the cars down there.

Thomas: What?

Francis: I heard him send the cars down ther.

Thomas: Because I was just — just after leaving the Toddle House, taking that kid down to get that car down in New Britain.

Francis: Oh, no, it was before that, wasn't it?

Thomas: Well, I don't know if this had (Q-65) been going on for quite a while. I imagine — but there was nobody around, and there was just one guy looking at it.

Francis: Yeh, I heard it was quite a break.

Thomas: Oh, Christ, the water was coming out of there a foot high.

Francis: Yeh.

Thomas: There must have been a mess around there this morning.

Francis: I didn't see it this morning at all. I didn't even go down there. I went right home.

Thomas: Oh, yeh, because of the snow too.

O.K., Francis.

Francis: O.K.?

Thomas: Yeh.

Francis: Give me a buzz.

Thomas: Yeh.

Francis: Right, Tom.

Thomas: Right.

Voice: The last recording was made on February 19th at 9:35 A.M.

TAPE 3

(FEBRUARY 20, 1964 AT 12:12 P.M.)

Francis: — phone, and pull it right off the fucking wall. (Q-66)

Thomas: Holy Mackrel, Frankie, I've been trying to get you for an hour and a half.

Francis: I thought you were dead.

Thomas: Oh, no, Christ, I called two or three times, but I'm in a very bad spot here where I am.

Francis: You call me back?

Thomas: They wanted to let that thing go a day or two on account of Paulie. They're all upset about that case.

Francis: Oh, shit, if he doesn't want to meet me, fuck it.

Thomas: I know it, but I can't do nothing. They're all upset. He's all upset about the God damned thing. He called up last night — I called him last night, see —

Francis: Yeh.

Thomas: —and they're all upset about that God damned Paulie. I don't know what the hell —

Francis: Well, what the hell difference does that make whether he meets me or Paulie? All I want to do is see him for two fucking minutes and he can screw.

Thomas: Yeh.

Francis: And that'll satisfy me. I won't even have to go down to that fucking end of town any more.

Thomas: Well, I'm fed up with it too. I got my belly full of them.

Francis: For Christ's sakes, I'm willing to meet him half way. (Q-67)

Thomas: Yeh. Well, I gotta call him again right after lunch — right after their lunch — it's busy.

Francis: Christ's sake, if he could meet me — just talk to me two fucking minutes, and then I'll tell this other kid "Everything's fine, forget it" —

Thomas: Yeh.

Francis: "Go along and everything is gonna be good."

Thomas: Well, I can't tell him — I'm in a bad spot here, Francis.

Francis: Huh?

Thomas: I'm in a very bad — I had a nice spot the last couple times I called you.

Francis: Yeh.

Thomas: I can't talk here. I'm talking on an open phone.

Francis: What the hell time is it, quarter after twelve?

Thomas: Quarter after twelve.

Francis: When can you call me, so I'll know for sure? Call that son-of-a-bitch and tell me that all I want is two minutes — the least he could do is give us —

Thomas: I'll call him up at 1:30. He told me to call him up 1:30 again.

Francis: At least he could give me two minutes of his fucking time; that's all I want. (Q-68)

Thomas: O.K., Frank.

Francis: All right?

Thomas: I'll call him back again.

Francis: Did you hear anything about anything else?

Thomas: No, nothing. I ain't giving a shit. Frig it.

Francis: Look all right?

Thomas: It's a situation that can happen to anybody. I mean, whoever is looking for me and looking for me — what the hell can I do about it? I'm not going to get excited about it.

Francis: Like I say, I'm doing an awful lot of worrying about that fucking thing until you tell me something good.

Thomas: Well, I'm more worried about you than I am myself. I just hope nobody pins you to the thing, that's all.

Francis: How can they pin me —

Thomas: That's one fucking — I'd never pin you.

Francis: Well, do you think that son-of-a-bitch will give me two minutes of his fucking time?

Thomas: I think he would.

Francis: Well, that's all I ask —

Thomas: And then something about some tomato truck — you see, he's got this produce business.

Francis: Well, that son-of-a-bitch —

Thomas: And something happened, coming all (Q-69) the way from Florida, down there on the Jersey Turnpike they must have had some God damned accident or something and tomatoes all over the fucking road, I think. I don't know what it's all about.

Francis: Well, that son-of-a-bitch can give me two minutes tonight or —

Thomas: All right, let me call you right after 1:30.

Francis: —he can go jump right in the fucking river. All right?

Thomas: Yup.

Francis: Tell him — like I say, I don't want all night. We can sit in the car for one minute and then he can screw.

Thomas: O.K. boy.

Francis: In fact, I don't want to make it too long anyway.

Thomas: Yeh.

Francis: Look, give me a time when you're gonna call me so I can get some things done.

Thomas: Well, right after 1:30 I'll call. Well, I'll call you any time you want.

Francis: Well, I want to know once you know definite from this son-of-a-bitch so we can plan it.

Thomas: Well, if I get the answer from him by 1:30 I'll call you right after 1:30 — between 1:30 and 2. (Q-70)

Francis: All right.

Thomas: O.K. boy.

Francis: Definitely between 1:30 and 2?

Thomas: O.K.

Francis: Like I say, tell him I don't want his life. I just want two fucking minutes.

Thomas: O.K. boy.

Francis: All right?

Thomas: Yeh.

Francis: Right, Tom.

Voice: The last recording was made on February 20th, 1964 at 12:12 P.M.

(FEBRUARY 20, 1964)

Thomas: Yeh, Soapy called me. I just got a call from Soapy.

Francis: Yeh.

Thomas: And Soapy left a message.

Francis: Yeh.

Thomas: Pauline is not — he's coming back, but I told him I had to let you know by 2 o'clock.

Francis: Yeh.

Thomas: So, what Soapy says is that they don't want to do a God damned thing until Paulie is all straightened out.

Francis: Well, at least he could meet me, the prick, (Q-71)

Thomas: Huh?

Francis: At least he could meet me.

Thomas: What's that?

Francis: I say at least he could talk to me.

Thomas: Well, I discussed that with him and they're just upset about the whole thing. Something happened down there — I don't know what the hell happened down there.

Francis: Well, did that attorney go down and see them?

Thomas: I guess so.

I did what you told me. But, I still gotta get ahold of Paul.

Francis: Do you think —

Thomas: Soapy just told this. Now, I was "Was this after I called him or before?"

Francis: Yeh.

Thomas: And — because I — when I called you.

Francis: Yeh.

Thomas: That was the first time I called.

Francis: Yeh.

Thomas: Now, I called again.

Francis: Yeh.

Thomas: I said, "When did you get this?" He said, "Well, this was this morning," because this guy's in a fog — this kid. But, I just wanted to keep (Q-72) my word with you that I would call you back, and even now I'm a half hour late.

Francis: Well, do you think that Tropiano would at least do me the courtesy to give me a call here at home?

Thomas: Well, I'll know better through Paul right now because I can't get ahold of him. I tried — I tried all morning.

Francis: Well, in other words, you think that Tropiano would give me a call here? We'll settle it right here and now.

Thomas: I'll try.

Francis: Huh?

Thomas: I'll try, if I can get the call in.

Francis: Well, you can get ahold of him. You know where you can get ahold of him somewhere. What are you doing tonight?

Thomas: I'm in a bad spot here (inaudible) Let me call you back?

Francis: All right.

Thomas: All right.

Francis: Right away?(Q-73)

(FEBRUARY 20, 1964)

Thomas: Finally get you. That phone of yours is terrible.

Francis: No, the phone hasn't been busy in the last two hours.

Thomas: I've been trying to get you, and I called my house and my wife said "Mr. Gilmore has been trying to get you (or ya). I just walked in the door.

Francis: I thought you were gonna call me right back?

Thomas: I couldn't. I didn't have any message for you. I ain't even got one now.

Francis: You haven't even got one now?

Thomas: No. They're all upset down there about Paul. They're all upset about Paul — really upset. I don't know what the hell happened down there. They want me to go down there, and I'm too God damned (Q-74) tired.

Francis: You're not gonna go down?

Thomas: Ah, to hell with them. Christ, I'm disgusted with them. I don't know what the hell's going on down there. Something happened, I don't know.

Francis: You didn't see Whitey today?

Thomas: No, I was around Hartford — New Britain all day today.

Francis: For cripe sakes.

Thomas: They want me to go down, and Ethel (sic.) says — not Ethel, but down at Walter's the place there, told me that I had a couple calls from New Haven, and I called you first. I just went in there about fifteen minutes ago, and your line was busy twice, and I called —

Francis: My line was busy?

Thomas: Twice.

Francis: I hope you've got the right number.

Thomas: I don't have no trouble. I just got home. I just walked in the door.

Francis: Oh.

Thomas: Just got to my place here not even five minutes ago.

Francis: You couldn't have called my number because it wasn't busy.

Thomas: Well, I called there, I would say, about ten or fifteen minutes ago.

Francis: Yeh.

Thomas: Because I've been trying to get — and then I called here, my wife — probably it's about the same time I'm calling — you're calling my house and I'm trying to get you.

Francis: What are you gonna do tonight?

Thomas: I want to stay right here. I just got home and my wife's got a nice steak for me and I'm gonna eat the son-of-a-bitch of a thing.

Francis: You wouldn't be out in about an hour?

Thomas: I wouldn't like to. Jesus, I'm so God damned beat up tonight, I'm telling you. I've been on the go since 7:30 this morning.

Francis: Yeh.

Thomas: I'm so God damned tired — I had to go up to them horses, and nobody went up there to plow out, and I

got stuck up there, and I was alone, and I'll be a son-of-a-bitch, I'm dead, Frank.

Francis: Yeh.

Thomas: I really am. I'm beat. Honest to Christ, she's got a nice looking steak, and she's all teed off because I got in late —

Francis: Ahearn is supposed to be coming down and seeing me in about a half hour, and I just wondered if you were there I would give you a call.

Thomas: Down your house?

Francis: Well, no, no, no. (Q-76)

Thomas: Oh.

Francis: I'd give you a call, and you could probably talk to him on the phone, and say, "Hey, don't worry everything's o.k."

Thomas: Well, as far as I'm concerned I don't think there's anything changed, Francis. I think they're all concerned about him. He's a nervous guy. He feels he's gonna blow that license down there, and that's what he feels, and that's what some lawyer told — who's Jacobs?

Francis: I don't know who the hell Jacobs is.

Thomas: Well, Francis —

Francis: If he didn't do what we told him I don't give a good God damn. We went the route, and if he didn't do what you told him —

Thomas: They got him all upset, and they figured, well, he's been — he's had the violations for frequenting gambling.

Francis: Yeh.

Thomas: And he's worried about the God damned thing. So, what the hell, this isn't anything that happened now, so what the hell they want to cry over spilled milk — that's happened before.

Francis: Yeh. But you think the deal between Tropiano is still the same?

Thomas: Well, I wouldn't say any different. (Q-77)

Francis: Sure. I can't see any different either; I don't know why, but this kid's worried, that's all.

Do you think you'll be home?

Thomas: I'll be home, yeh. I'm gonna have something to eat; I'm dead.

Francis: You'll be home in about an hour?

Thomas: Oh, yeh.

Francis: Or an hour and fifteen minutes?

Thomas: Yeh. I'm not gonna go nowhere. I'll be right here. Call back.

Francis: Well, if you'r gonnabe somewhere tell me, because Christ's sake, I've been trying to get ahold of you all God damned day.

Thomas: No, no, I'll be right here. I just walked in the doof, and I ain't gonna leave. Just take my shoes off; that's as far as I got.

Francis: In other words, you'll be there in about another hour?

Thomas: Yeh.

Francis: O.K.

Thomas: All right.

Francis: Right.

Transcribed by:
Arthur E. Moan, Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 14,263

RALPH TROPIANO

v.

ROBERT L. MOSELEY, WARDEN,
FEDERAL PENITENTIARY,
LEAVENWORTH, KANSAS.

RULING ON PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner is presently a federal prisoner in the Federal Penitentiary, at Leavenworth, Kansas, having been convicted and sentenced for violating and conspiring to violate the Hobbs Act, 18 U.S.C. § 1951 (interference with commerce by threats or violence). This writ of habeas corpus was originally brought in the District of Kansas and was transferred to this Court pursuant to 28 U.S.C. § 1404(a). The Petitioner is not challenging his present federal sentence, but alleges constitutional errors in a prior state conviction upon which he is required to serve three to six years, commencing upon his relief from federal custody. He claims that this circumstance justifies federal jurisdiction under the pending sentence doctrine of *Peyton* v. *Rowe*, 391 U.S. 55 (1968). His petition alleges that the following errors occurred in his state court trial: (1) certain tape-recorded evidence of a conversation between a police officer and a co-conspirator was improperly admitted into evidence; (2) the jury charge failed to adhere to the rule of *Griffin* v. *California*, 380 U.S. 609 (1965); and (3) the defendant was denied the opportunity to cross-examine a state witness fully. The Court finds that the application is without merit and the writ is denied.

The petitioner's state charges alleged in substance that

he (and others tried separately) conspired in violation of Conn. Gen. Stat. § 54-197 to "offer money to police officers with the intention of illegally influencing the latter's behavior, so that illegal gambling and unlawful liquor establishments might be permitted to operate." *State* v. *DiBella*, 157 Conn. 330; 338, 339 (1968). During the course of the trial, a tape recording was played disclosing a conversation between a co-conspirator and a police officer. The jury not only heard the co-conspirator's words, but also the policeman's response and comments. The petitioner contends that the jury was influenced by the policeman's statements and that his case was thereby greatly prejudiced. This Court concurs with the conclusions of the State Supreme Court when it said:

> "Although Reynolds' part in the conversation was not admissible to prove the truth of any assertions made by him, since he admittedly was not a co-conspirator, nevertheless his portion of the conversation was admissible for the limited purpose of giving meaning and coherence to DiBella's statements. See *United States* v. *Morello*, 250 F.2d 631, 634 (2d Cir.); 7 Wigmore, Evidence (3rd Ed.) § 2097, 2099." *State* v. *Tropiano*, 158 Conn. 412, 421 (1969).

In respect to the petitioner's second point, no claim has been made that error was committed by the court in its charge, by making a direct comment concerning the defendant's failure to take the stand or testify in his own behalf. The defendant's trial attorney had requested the judge to instruct the jury that no adverse inferences could be drawn from the defendant's failure to testify. *See United States* v. *Schabert*, 362 F.2d 369, 372, 373 (2d Cir. 1966). The trial court in the present case charged as follows:

> "From the fact that a man is presumed to be innocent, the next principle follows; namely, that the burden of proof is upon the State throughout the trial to

prove an accused guilty and an accused does not have to prove his innocence. That is to say, it is incumbent upon the State to carry the burden of proving its case in all its essential elements before a verdict of guilty may be rendered. Mr. Ralph Tropiano was under no obligation to go forward with witnesses to defend himself or to take the stand. No presumption, no inference of any kind should be drawn against him because he hasn't undertaken to testify or because he has not called witnesses in his own behalf.

"The accused had the right to testify if he so elects. He has the right to call witnesses and explained the case from his standpoint, but no inference of guilt should be drawn against him for the reason alone that he does not elect to exercise either of those rights; because, as I have said, he is presumed to be innocent and the State has upon it impressed by law the burden of overcoming that presumption and establishing beyond a reasonable doubt every essential element of the crime charged. And, until that is established by evidence beyond a reasonable doubt, the presumption of innocence is not overcome." (Respondent's Exhibit #1, p. 62).

The petitioner argues chiefly that this portion of the charge quoted was violative of his constitutional rights in that it did not indicate that he had the right to remain silent (as opposed to the actual phrase used, "no obligation to take the stand"); and the court used the expression, "no inference of guilt should be drawn against him for the reason alone that he does not elect to exercise either of those rights". In examining these words, they must be considered within the framework of the totality of the Court's charge to the jury and not removed from their context. No particular form need be utilized to advise the jury of the defendant's right to remain silent and all remarks on this point must be viewed within the framework of the charge

as a whole. *See United States* v. *Cusumano*, 429 F.2d 381 (2d Cir. 1970). The charge throughout stressed that the jury could draw no inference from the failure to take the stand and did not violate the bounds of *Griffin*. On the related point argued by the petitioner that this portion of the charge did not adequately explain the burden of proof required to convict, reference should be made to *United States* v. *Hart*, 407 F.2d 1087 (2d Cir. 1969), where the court declared that the "reasonable doubt" standard may be expressed in various terms. The trial court adequately explained the burden of proof to the jury.

The final error alleged by the petitioner need not be considered here as it does not present a constitutional question. The petitioner claims, as he did in the state courts, that his rights were violated by the trial judge's exclusion from evidence of the fact that one of the state's witnesses had previously pled guilty to the same charges. This is not an area which may be reached on federal habeas corpus.

> "His (the trial judge's) action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948).

See *Schaeffer* v. *Leone*, Dkt. No. 34493 (2d Cir. May 24, 1971). The application for a writ of habeas corpus is without merit and is therefore denied. So ORDERED.

Dated at Hartford, Connecticut, this 14th day of July, 1971.

T. EMMETT CLARIE
United States District Judge

JUDGMENT

This case came on for consideration on a Petition for a Writ of Habeas Corpus, and the Court having entered its Ruling under date of July 15, 1971, denying the said petition,

It is accordingly ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of the respondent, dismissing the petition for a writ of habeas corpus.

Dated at New Haven, Connecticut, this 23rd day of July, 1971.

(s) GILBERT C. EARL
Clerk, United States District Court
By:
(s) ILLEGIBLE
ILLEGIBLE
Deputy-in-Charge

CERTIFICATE OF PROBABLE CAUSE

This Courtdenied the application of the petitioner for a writ of habeas corpus on July 14, 1971. An appeal from said decision was filed with this Court on July 23, 1971.

The detention complained of in said application arose out of process issued by the Connecticut State Court. Pursuant to the provisions of 28 U.S.C. § 2253, this Court is of the opinion that substantial legal issues have been raised in said petition and accordingly issues a certificate of probable cause as required by law. So ORDERED.

Dated at Hartford, Connecticut, this 26th day of July, 1971.

T. EMMETT CLARIE
United States District Judge

In The

Supreme Court of the United States

No. 71-927

RALPH TROPIANO

Petitioner (Appellant),

vs.

ROBERT I. MOSELEY, WARDEN OF FEDERAL PENITENTIARY AT LEAVENWORTH, KANSAS,

Respondent (Appellee).

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-927

RALPH TROPIANO,
Petitioner (Appellant),

vs.

ROBERT I. MOSELEY, WARDEN OF FEDERAL PENITENTIARY AT LEAVENWORTH, KANSAS,
Respondent (Appellee).

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CHARGE OF TRIAL COURT

The court charged the jury as follows:

151. The COURT. Ladies and gentlemen of the jury, my recollection is that in this case of the State of Connecticut versus Ralph Tropiano, the voir dire examination of prospective jurors therein began on Tuesday, September 21, 1965. It continued for a few days and as each of you were about to be examined, it must have become clear that it was essential to concentrate on what was going on then and on the questions addressed to you by counsel.

152. Subsequently, the selection of this jury having been completed near the close of the court day on September 29, 1965, you were sworn in as jurors in this case. Immediately, you were asked to listen closely to the reading of the amended information by our clerk on that day, Attorney Harold Ivey. Our regular clerk, of course, is Mr. White.

153. Again, on the next day, September 30, 1965, you were directed to give your entire attention to the presentation of evidence which then began before you and continued until yesterday afternoon; that was October 14, 1965. You were told of the same requirement concerning attentiveness as the arguments of counsel were about to begin today, and now I advise you, as I charge you in this case, that you must continue to give your undivided attention and thought to that which I am about to say to you.

154. Now, ladies and gentlemen, before I go further perhaps I should warn you that it may seem to you as I go along that the charge is rather lengthy. It will be a little bit more lengthy than some charges which I ordinarily deliver. The reason is not so much because the law pertaining to conspiracy, the crime here charged, is disturbingly complicated or involved, but rather that sometimes the application of the law to the facts of the case, particularly where there may be some dispute as to the facts, is a little bit difficult, and I am anxious to do all that I can to assist you in the decision of this case.

155. I have written out, or caused to be typed out, most of what I intend to say to you in the hope that thereby I can curtail the period of time necessary to deliver this charge to you. What I want to do, generally speaking, and in the first

place, is to make plain to you just what your function is in the decision of this case and to give you some guides as to the methods to be employed by you in the performance of that function.

156. Next, I intend to deal with the principles of law which are applicable to all criminal cases. Another part of the charge will be taken up with instruction to you as to what the law is which is applicable to this particular case, and then, very briefly, I intend to outline to you the claims of the respective parties and, also, very briefly, apply to those claims these principles of law which I shall have been giving to you in the rest of the charge.

157. Now in this case, as in all cases, there are two kinds of questions which have to be decided: There are questions of law and there are questions of fact. It is a proper activity of the presiding Judge to decide all questions of law which are involved in the case. That is to say, it is my function and responsibility, in the first place, to analyze the information and the evidence and decide what the issues of fact are which you will have to decide and then to outline to you those issues.

158. It is also my responsibility to decide and instruct you as to what the principles of law are which should control you in the decision of the facts, and for the sake of orderly procedure it is always necessary that the jury accept, as being the law of the case, the law which is given to them by the Judge in his charge. That is true even though the principles of law which are given by the Judge may differ in some particulars from the law which has been referred to by counsel in argument. It is true even though the law as given by the Judge is at variance with what the jury may think the law ought to be.

159. Of course, no man is infallible, and no judge will claim to be infallible on the law, but for the sake of orderly procedure you must ignore what you think the law ought to be or what counsel may have claimed the law to be, and accept as being the law of this case the law which I give you in this charge, and, as I say, that is the function which I have to perform in conneciton with the decision of this case.

160. Your function, on the other hand, is to decide all of the questions of fact involved in the case. You are the sole judges of the facts, and anything which I may say with reference to the facts of the case is said with no intention of in any way influencing you in the decision of what the true facts may be. It is your exclusive province to recall the evidence and to determine the facts. It is said only by way of illustration of the principles of law which I am trying to get over to you that I recall any evidence. So, as I say, that is your function in the case. You are to decide all of the questions of fact involved in the case, and you are the sole judges of the facts.

161. Now in performing your function, of course, one of the things which you have to do is to pass upon the credibility of the various witnesses who have appeared before you. In passing on the credibility of each of the witnesses, there are certain considerations you may well have in mind. One of these is the appearance which he made on the stand. Did he appear to be telling the truth? Did he appear to be honest? Did he appear to you to be intelligent; that is, did he appear to be a person who could have observed accurately what he is telling you about; who would be likely to have remembered it accurately and who is capable of reporting it to you accurately?

162. Another question for you to have in mind as regards each witness is the question as to whether the story he has told is plausible. Does it ring true, or are there inconsistencies in it? How does it fit in with other evidence in the case which you do believe? Does it jibe with that evidence? In short, does the testimony which was given by the particular witness whose credibility you are testing seem to you to be plausible?

163. In this connection you must also bear in mind that if you should conclude that any witness has been deliberately falsifying on any one material point in his testimony, you are privileged to take that fact into consideration in determining whether he has falsified on other points. Simply because you find that a witness has not repeated one fact to you accurately, it does not necessarily follow that he is wrong on every other point. A witness may even be deliberately falsifying on one point and yet be entirely truthful on all other points. But, if you find that a witness has deliberately lied on one material subject, it is only natural that you should be suspicious of his testimony on all subjects. Under those circumstances you are entitled to disbelieve his whole testimony. Whether you do disbelieve it or not, however, lies in your own sound judgment.

164. Another question which you may well ask yourselves in passing on the credibility of any witness is as to whether that witness has any bias of interest in the outcome of this case, and, if so, whether he has permitted that bias or that interest to color his testimony. It, of course, does not follow, simply from the fact that a witness does have a bias or does have an interest in the outcome of the case, that his testimony is to be disbelieved. There are many people who, no matter what their interest in the outcome of a case might be, or what their bias might be, would not testify falsely.

165. On the other hand, a jury should always bear in mind that if a witness has a decided bias or has an interest in the outcome of the case, that bias or interest offers something of a temptation to shade his testimony in accordance with his bias, or sway him to advance his own interest. It may even be that his bias or interest has so operated on his mind that he has come to believe what he wants to believe, and, therefore, he may testify falsely without at the time consciously realizing that his testimony is false. It is therefore obvious that if it should appear as regards any witness whose testimony or whose credibility you are testing, that he has some bias or some interest in the outcome of the case, that fact is one which the jury should take into consideration in weighing his testimony.

166. There is another matter dealing with credibility which I speak of now. As you know, there appeared here before you in this case several police officers who gave evidence. These included: Detective Francis Reynolds of the West Hartford Police Department, Lieutenant George Lovett of the West Hartford Police Department, and Detective Sergeant Stephen Ahern of the Special Service Squad of the police department in New Haven, Connecticut. You heard the testimony from these men.

167. In this connection you are instructed that you are not more readily either to believe or disbelieve a law enforcement officer simply because he is a law enforcement officer. Members of police departments, officers and such, are men who are under orders in the performance of their duties, and their testimony is neither to be believed or disbelieved by you any more or any less simply because they are police officers. They are employed to preserve the peace and law

and are not to be disregarded because they occupy that particular position.

168. On the other hand, you have a right to inquire whether they have any interest or motive or desire to injure this accused Ralph Tropiano, and, if so, you are to consider how far that bias affects their credibility. The testimony in evidence by such a witness as a police officer is to be weighed by you as you weigh that of any other witness. The same standards are to be used in weighing all evidence. In short, the mere fact that the witnesses concerning whom I speak of now are police officers should not militate for or against their credibility.

169. I should say a word at this point about the testimony of Pasquale Guglielmo. I believe he was the first witness in this case. If the story which he told on the stand is true, he was a member of the claimed conspiracy in this case, and, if so, therefore, an accomplice, so-called, of the other members of the conspiracy as claimed by the State and denied by the accused Ralph Tropiano.

170. It used to be the rule that a jury could never accept as true the testimony of an accomplice unless that testimony were supported and corroborated by other evidence in the case. That, however, is not the rule in this state today. It no longer is absolutely essential that the testimony of an accomplice be corroborated before it is believed by the jury. However, in weighing the testimony of an accomplice, it must be borne in mind that he himself is a self-confessed criminal, and everything else being equal, one would not believe the testimony of a man who has committed a crime involving moral turpitude as unreservedly as one would that of a man of good character.

171. Also, when you are testing the testimony of a self-confessed accomplice, like Pasquale Guglielmo, you should keep in mind that he may have had or may have such an interest in the outcome of the trial that his testimony may be colored by that interest. Because of such considerations the law now is that the jury should look with particular care at the testimony of an accomplice and scrutinize it very carefully before they accept it.

172. Indeed, in most cases it would be unsafe to rely on the testimony of an accomplice alone if it were not corroborated, but whether the jury, in any particular case, requires corroboration before it accepts the testimony of an accomplice, and if the jury does require corroboration at all, the amount of corroboration which it does require, all that rests in the sound judgment of the members of the jury.

173. In addition to the considerations which I have suggested to you there are probably many others which you as men and women of common sense, will apply in passing upon the credibility of witnesses. As a matter of fact, this whole matter of credibility of witnesss is simply one of common sense. In the everyday affairs of life you frequently come to a conclusion as to whether you believe or disbelieve something which has been told to you by another, and that you do by the application of sound common sense. That is what you are to do here. Except for the fact that here each witness has made oath to the truth of what he said, the situation is not very different from what it is when you are called upon in your everyday life to decide where the truth lies. Here, as there, you must, in large measure, be guided by your knowledge of human nature and your own common sense and good judgment.

174. There is another matter which I should speak of now. As regards some of the witnesses in this case, it has been shown or admitted that they have made statements outside of this courtroom which statements are claimed to be inconsistent with the testimony that they have given here under oath. Of course, that fact should be taken into consideration in weighing their testimony. The statements which they made outside of the courtroom are not to be taken as evidence of the truth of the fact stated therein in those statements. You may consider, for instance, whether or not the contradiction was or was not to some relevant, material fact, and whether or not it has been explained.

175. The fact that they made those statements bears on the case only insofar as it affects the credibility which you are going to give to their testimony, and the mere fact that a witness has made a statement outside which seems to you to be inconsistent with his testimony does not compel you to disbelieve his testimony here. It may well be that you consider that his testimony is true and his outside statement false or mistaken. But the fact that he has made a statement which is inconsistent with his testimony here in court is one thing which you should take into consideration in determining how much credence you will give to his testimony given here in court under oath.

176. After you have determined the credibility which you are going to give to each of the witnesses, you are then in a position to say how much of what each one has told you you are going to believe. You then join all that together and you have then the body of facts, which you believe to be true facts, which have come to you directly from the mouths of the various witnesses. You are then in duty bound to draw from

those facts inferences as to the existence of other facts; inferences, that is, which are reasonable inferences.

177. One sort of inference which you may have to draw in this case is the inference as to what information or knowledge the various people named in this information had in mind as they did certain acts. For instance, as I will explain to you in more detail later on, a combination of men into a conspiracy is not a criminal conspiracy unless they combine with the intention or purpose to do some unlawful act. Accordingly, you can see that if in this case you find that there has been a combination of men, you must go further and determine, if you can, what they intended to do, what purpose they had in combining. Or, again, as I will charge you later on, you may conclude that a man has become a member of a conspiracy if you find that he has done some act in furtherance of the conspiracy with knowledge that a conspiracy existed. For that reason, you see, you may have to decide whether this defendant, Ralph Tropiano, when and if he did certain acts, had knowledge that a conspiracy existed.

178. Now you can readily see that what a man's intention or knowledge was at any given time is quite largely a matter of inference. Of course, it is true that a man himself, if he chooses to do so, may take the stand and testify directly as to what his own intention or his own knowledge was, and that testimony you can believe or not, according to whether or not it warrants belief, but no witness can be expected to come here and testify that he looked into another man's mind and saw therein a certain intention or a certain bit of knowledge. The only way that you, the jury, can here determine what this man's, Ralph Tropiano's, intention or knowledge was at any given time is by determining what his conduct was and what

the circumstances were surrounding that conduct, and, from those, infer what his purpose, intention or knowledge was. To draw such an inference is not only the privilege but also the duty of a jury, provided, of course, that the inference drawn is a reasonable inference.

179. In this case, therefore, it will be a part of your duty to draw all reasonable inferences from the conduct of this defendant Ralph Tropiano in the light of surrounding circumstances as to what purpose, what intention, and what knowledge was in his mind at various times.

180. Now, after you have decided what of the facts testified to by the witnesses you believe, and after you have decided what inferences are to be drawn as to the existence of other facts, you then have in mind the sum total of what you believe the true facts were about the claimed crime with which you are hereby concerned. You then apply to those facts the principles of law which I give you in this charge, and in that may arrive at your verdict.

181. In the information before you and which you will have in the jury room, a number of men have been charged with the crime of conspiracy. The charges against four of these men named in the information, as you have already been told of or are told of, have been otherwise disposed of on a previous occasion or trial; and there are left for your consideration the charges against Ralph Tropiano alone. He is here the sole defendant. Any knowledge or any surmise which you have or may learn or conclude as to the manner of handling of or the disposition of the charges against the other defendants accused in this information you must not let in any way influence your minds in passing on the case of this accused, Ralph Tropiano, whom you have here in charge.

182. The manner of disposition of the cases against the others has neither bearing upon nor relevancy to the question as to the guilt or innocence of this accused who is on trial. Of course, the question of the guilt or innocence of Ralph Tropiano must be decided solely on the evidence produced here in court on this trial, without any reference to what has been done or may be done with the other defendants named in the information.

183. Likewise, if it should have appeared to you that there may have been others implicated in any conspiracy which the State may have proved, that is, other than those named in the information, that fact should have no influence on your mind in determining the guilt or innocence of this man Ralph Tropiano now on trial. The failure to prosecute each and every one of the conspirators involved in a conspiracy or the failure to prosecute all those involved in a conspiracy together, or collectively, does not prevent or preclude the prosecution separately of a part of them or any one of them. So much is said for some of the considerations which you should have in mind as guides for you in weighing the evidence and deciding the facts of this case.

184. Speaking of evidence, you will recall that the jury was excused several times during the trial of this accused, both by request or on suggestion of counsel and by direction of Court itself. Previously you were told, and I deem it advisable to say it again, that you are not to gather anything favorable for or unfavorable against the prosecution, the defense, or counsel from any such procedure. Our courts deem it best that certain matters of evidence and questions of law are more properly proposed and resolved without any discourse thereon in your presence, and in this way you, the jury,

cannot be confused by any such discussion. Rulings in such matters are in the particular province of the Court and not at all part of the proper business or duty of the jury.

185. Another matter that I would like to speak of now is that in this case there were objections and rulings and exceptions. You are to consider only the evidence that was admitted and, if some evidence was given, but stricken, or some evidence offered and refused, you must not consider it, and if you heard it, your are to dismiss it from your minds. The rules of evidence have been evolved over a span of a great many years and have been proven to be the fairest and most just for the protection of both parties in the case, and, in fact, if I have made a mistake as to the rulings on evidence there is a way provided to correct that error. You need have no concern at all in this regard.

186. I speak to you further at this time about some of the principles of law which are applicable not only to this but to all other criminal cases. I speak of three principles of law which are applicable to all criminal cases, and, of course, they are applicable to this one. The first is what is called the doctrine of the presumption of innocence; the second is the doctrine that the burden of proof is upon the State; and the third is the rule that the State must prove its case beyond a reasonable doubt before a verdict of guilty can be brought in.

187. The doctrine of presumption of innocence, in a few words, is that the accused is presumed to be innocent unless and until his guilt is established and proven. That is, at the time this trial started the accused, Ralph Tropiano, appeared before you with a clean slate. Nothing which you may have known or surmised about him, if there was any such, may be considered by you in arriving at your verdict. The fact, for

instance, that the State's Attorney has decided to press a charge against an accused person should not weigh at all as against that accused in the minds of you, the jury, in passing on the question of his guilt or innocence. In short, so far as you are concerned, this accused is innocent of the crime here charged unless and until the evidence produced bfeore you here in court satisfies you of his guilt.

188. From the fact that a man is presumed to be innocent, the next principle follows; namely, that the burden of proof is upon the State throughout the trial to prove an accused guilty and an accused does not have to prove his innocence. That is to say, it is incumbent upon the State to carry the burden of proving its case in all its essential elements before a verdict of guilty may be rendered. Mr. Ralph Tropiano was under no obligation to go forward with witnesses to defend himself or take the stand. No presumption, no inference of any kind should be drawn against him because he hasn't undertaken to testify or because he has not called witnesses in his own behalf.

189. The accused had the right to testify if he so elects. He has the right to call witnesses and explained the case from his standpoint, but no inference of guilt should be drawn against him for the reason alone that he dose not elect to exercise either of those rights; because, as I have said, he is presumed to be innocent and the State has upon it impressed by law the burden of overcoming that presumption and establishing beyond a reasonable doubt every essential element of the crime charged. And, until that is established by evidence beyond a reasonable doubt, the presumption of innocence is not overcome.

190. This brings us to the third principle which is applicable to all criminal cases, before the jury may render a verdict of guilty, and that is, as I have said, that the State must prove every essential element of the crime charged beyond a reasonable doubt. This phrase "reasonable doubt" has no technical nor unusual meaning. It is self-explanatory. You get the real meaning of the phrase if you emphasize the word "reasonable." A reasonable doubt is a doubt for which a valid reason can be assigned. It is a doubt which is something more than a guess or surmise. A reasonable doubt is not such a doubt as is raised by one who questions simply for the sake of an argument. It is not a doubt suggested by the ingenuity of counsel which is not warranted by the evidence. A reasonable doubt is a real doubt, an honest doubt, a doubt which has its foundation in the evidence offered in the case or in the absence of evidence. It is such a doubt as, in the affairs which concern yourselves, that is, serious affairs, you would pay some heed to.

191. Absolute certainty in the affairs of life is almost never attainable and the law does not require absolute certainty on the part of a jury before it returns a verdict of guilty. What the law does require, however, is that, if, after hearing all the evidence, there is something in that evidence or lack of evidence which leaves in the mind of the jury, as reasonable men or women, a reasonable doubt of the guilt of the accused, then the accused must be given the benefit of that doubt and be acquitted.

192. It necessarily follows from that, that if any fact or any element bears equally two ways, one toward innocence and the other towards guilt, then it must be given that direction which tends toward innocence. No accused is to be convicted on mere suspicion. It is incumbent upon the State to negative

every supposition not in itself improbable, which is consistent with the innocence of the accused; and, if you can, in reason, reconcile all the facts present with any reasonable theory consonant with the innocence of the accused, then, of course, you cannot find Ralph Tropiano guilty.

193. Every crime is made up of several essential elements, and the burden here is on the State to prove beyond a reasonable doubt all of the essential elements of the crime of conspiracy as charged in the information in this case before it can ask for a conviction. What the essential elements of the crime here charged are, I will explain to you in just a short while. For the present it is enough for me to say that before a jury can return a verdict of guilty of any crime, the State must have proved every essential element of that crime beyond a reasonable doubt as the latter has been explained to you.

194. Another general principle of law which applies in nearly every criminal case, and certainly applies in this case, is that in order to be guilty of a crime, a person must have a criminal intent or guilty knowledge. This means that before a man should be found guilty of a crime, it must appear and be found beyond a reasonable doubt that in doing the acts complained of he had a guilty mind, or, as it is sometimes stated, an intent to do evil. If, in doing the acts complained of, he has not that intent he is not guilty of the crime. For instance, if a man is honestly mistaken as to the existence of certain facts; if, without gross negligence on his part he honestly believes that certain facts existed, and if, in the light of those facts which he believes to exist, the act charged against him would appear to be entirely moral, then the act with which he is charged is not a crime, even though it would be immoral in the light of the true facts. There, you see, the

act charged is not a crime because the man committing the act has no evil intent.

195. In the same way, if an accused has done that act complained of accidentally, the act is not a crime, because it was not done with an evil intent. For instance, if in this case you should find that the accused did some act which really assisted some others in accomplishing an unlawful act, but in doing it, because of his ignorance of the existence of some material facts, he did not realize that the doing of the act was in aid of any conspiracy, then the doing of that act would not make him guilty of the crime of conspiracy because it was done without any criminal intent.

196. What I have said about matters of fact or mistakes in fact excusing a man from crime because it removes from the crime the element of guilty intent does not apply to mistakes of law. Ignorance of the law excuses no one. If a man does on act which, in the light of the facts as he knows them to exist, is evil or immoral and is recognized by him to be such, it makes no difference that he is ignorant of the fact that the act is expressly prohibited by law or is unlawful. The reason for this rule is obvious. In most cases it would be impossible to prove that an accused did or did not know that the law expressly forbade the act which he is charged with committing.

197. Public policy therefore demands that we proceed on the presumption that everyone knows the law; and, therefore, the law is that no one may escape punishment for crime simply by saying that he was ignorant of the fact that the law forbade the doing of the act. The evil purpose essential to make an act a crime need not be an intention to break the law. It is sufficient if it is simply an intention to do the things which the law in reality does forbid.

198. To illustrate what I have just been saying by applying it to the present case if you should find that an unlawful conspiracy existed for the purpose of offering a bribe to police officers to permit and protect violation of law or the unlawful acts as alleged to the end that gambling establishments and illegal liquor establishments might be permitted to operate in the counties of Hartford or New Haven, or other counties; and should find that Ralph Tropiano, the accused, did some act in furtherance of the conspiracy, but that in doing it he did not know that the conspiracy existed or did not know what the real purpose of the conspiracy was, then you would have to find that the accused was not guilty, because in such a situation and in the light of the knowledge he had, what he was doing was not evil or immoral.

199. If, on the other hand, you should find that a conspiracy did exist for that unlawful purpose as charged, and should further find that Ralph Tropiano, the accused, did join the conspiracy with knowledge of its purpose, then he would not be absolved from guilt simply because he did not know that it was against the law to offer money to police officers concerned with the administration of justice with intent on his part to illegally influence the behavior of these officers in their offices to the end that gambling establishments and illegal liquor establishments be permitted to operate. His ignorance of the law would not excuse him. His intention to join a conspiracy with knowledge that it was for such a purpose is a sufficiently guilty intent in itself.

200. Now, I come a little bit more specifically to the law concerning conspiracy. The crime charged against the defendant in this case, as you know, is the crime of conspiracy. The charge is brought under Section 54-197 of our statute

law which reads in part as follows, and I quote in part from the statute:

> "Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means, or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement".

he shall be punished and so forth. You have no concern with punishment at all.

201. A careful reading of that statute shows that the crime of conspiracy as it is charged here is made up of three elements. That is, before you may bring a verdict of guilty against this defendant Ralph Tropiano you must be satisfied beyond a reasonable doubt that the State has proved against him each and all three of those elements. The three pertinent elements which relate to the crime of conspiracy as here charged are: First, that the accused participated in a combination, confederation or agreement, as charged; second, that the purpose of that combination was to accomplish an unlawful object, by unlawful means, and third, that one or more of the conspirators did some overt act in furtherance of the combination. Now, let me take up with you somewhat in detail each of these elements of the crime of conspiracy and point out what is involved in each.

202. The first element is the combination. That is, the first thing which you have to consider as regards this accused is: Was he a member of the combination as charged in the information?

203. First, let me point out that the unlawful combination is the gist and gravamen of the crime of conspiracy. The gist of the offense in the crime of conspiracy is not so much the doing of the unlawful act which the conspiracy was organized to accomplish, as it is the formation of the combination between two or more persons for the purpose of accomplishing those acts.

204. The reason why the law punishes the crime of conspiracy when it is proved is that by combining and pooling their resources, two or more individuals can presumably accomplish the unlawful act planned more effectively than could any one of the group acting alone. And so, although it is necessary to make the crime of conspiracy complete, that the conspirators do some act in furtherance of the conspiracy, still, in the eyes of the law, it is the combination of persons which is the foundation — the main point of and the most serious part of the offense. You must therefore keep it in mind clearly that the crime charged in this information is not the crime of bribery. The crime of bribery itself may, in part, be defined as an attempt, whether successful or the reverse, to influence an officer in the discharge of his official duties or the criminal offense or offering, giving, soliciting something of value with an intent to corruptly influence the action of a public official.

205. But, again, I say to you that bribery is not the crime that is here charged in the information. The crime charged in this amended information, which, as I have said, you will have with you in the jury room, together with the other exhibits, during your deliberations, is the crime of conspiracy, and what you will have to decide is, as to whether or not the defendant Ralph Tropiano entered a combination or confed-

eration to accomplish the unlawful acts set out in the information.

206. It is necessary that you should understand just what the law means by "combination or confederation." In order that two or more persons should be guilty of the crime of conspiracy, it is not necessary that there should be a formal or even expressed agreement among them. Of course, it is possible for a combination to be formed by way of various members entering into an express agreement among themselves, but, as I say, it is not necessary that it be done that way. All that is necessary in order to prove a combination or confederation among two or more persons is to show that they acted in concert to accomplish the unlawful purpose, each knowing that the other or others were also working with him toward that end.

207. One does not become a member of a combination in a conspiracy simply because he knows that a combination for unlawful purposes exists among a group of other persons and simply by or with passive acquiescence in or approval of such a combination. That is, he does not become a member under those circumstances if he does nothing about it. It requires more than knowledge and consent by silence on the part of a conspirator to sustain his connection with a conspiracy.

208. If he does know that the combination exists and then does something or makes some agreement in furtherance of it, or shows his intention to participate in some way, he thereby becomes a member of it. In other words, any person who takes part in a conspiracy, whether as a party to the agreement or by knowingly doing an act in furtherance of the

common design, with evil intent, has become a member of the conspiracy. Nor is negative assent enough, but there must be some active intent that the unlawful acts shall be committed and an intentional participation in the transaction with a view to the consummation of the common design and purpose.

209. In connection with those principles, I also state to you that if you do not find that Mr. Ralph Tropiano joined this conspiracy, then you must find him not guilty. However, if Mr. Tropiano was a member of the conspiracy and while a member of the conspiracy, at least one of the overt acts alleged in the information was committed by another conspirator for the purpose of effecting the objects of the conspiracy, that is enough. It is not necessary for the State to prove that Mr. Tropiano himself committed an overt act, because if an overt act was committed by one of the other conspirators, if you find Mr. Tropiano to have been in the conspiracy, then he is bound by the overt act of a co-conspirator.

210. A member of a conspiracy is chargeable with knowledge of the acts done by any of his fellow conspirators in pursuance of the conspiracy whether the particular conspirator was an original member of the conspiracy or joined it later.

211. It is, of course, rarely that the State is able to prove that a group of persons charged with conspiracy either conspired in public, openly and notoriously, or sat down and entered into an express agreement that they would unite to accomplish an unlawful purpose. People who conspire do not usually draw up articles of agreement. Proof of the conspiracy is not often made by open, direct and positive evidence of a crime. More generally, and more naturally,

proof of a combination is made by showing a repetition of acts of a character conducing to show mutual purpose.

212. In a conspiracy, also, it is seldom true that any one act, taken by itself, can be detected as tending to prove a combination. But, when it is seen in connection with other acts of this accused, and other acts of others who were also named as conspiring, its true nature may be discovered. And so, as this species of proof is multiplied, a case of unlawful combination may be, thereby, made out.

213. To put it another way, the combination or confederation may be proved by circumstantial evidence; that is, by proof of the separate acts of individuals, and from circumstances from which the existence of the unlawful combination may be inferred. It is, of course, true that several persons may be engaged in doing separate acts or a separate series of acts, each of which is a crime, and may even come in contact one with the other in the doing of those acts, and still, if they are not acting in concert, there will not be any conspiracy.

214. Before you should bring in a verdict of guilty against the defendant in this case, therefore, you must be satisfied beyond a reasonable doubt that there was the conspiracy and that he participated in the unlawful combination charged. But, in order for you to find that such an unlawful combination existed or that this particular accused was a member of it, it is not necessary that you should find that he entered into a definite and express agreement with others to the effect that they would unite. It is not necessary that you should find that there was an open and expressed declaration among those named in the amended information in this case that

they would unite to accomplish the unlawful purpose charged. If you find that some of the various acts charged were committed in such a manner and under such circumstances that you are forced to conclude therefrom, beyond a reasonable doubt; that the defendant, doing whatever, if anything, you find he did do, was acting in concert with the others to accomplish the unlawful purpose charged, then you have found that such a combination existed among them as makes a combination in conspiracy. That is, it is a concert of action to accomplish an unlawful purpose that makes an unlawful combination or confederation, whether those who engage in such concert of action have expressly agreed to unite or not.

215. Now, from all of this you can see that it is entirely possible to have a situation where two or more persons combine to accomplish an unlawful purpose by the doing of a series of unlawful acts. This may constitute a single conspiracy. And as they go along the orginal conspirators may take others into the scheme for the purpose of using them to perform some of the unlawful acts which are incidental to these schemes. If those other persons do come into the scheme with the knowledge that the combination exists, even though they come in only for the purpose of doing a certain act which is in furtherance of the objects of the combination, they then become members of the combination, and when such newcomers do so join up they are just as much members of the conspiracy as they would have been if they had been members from the very beginning.

216. In other words, in order here to get a conviction of this defendant Ralph Tropiano it is not necessary for the State to show that he is one of the original combination. It is enough for the State to show merely that he did something

which actually was in furtherance of the purpose of the combination, with a guilty intent, and knowing that a combination among the other existed. Whether or not a man is one of the original group or comes into the group later makes absolutely no difference.

217. In the same way, it is, of course, not essential that all of the members of a conspiracy unite to do the same acts at the same time or that all of the conspirators engage in all of the activities of the conspiracy. Indeed, it more frequently happens in conspiracies that you have one man or group of men doing one act or series of acts at one time and another, or other men or other groups of men doing other or different acts at other times and other places. It is not even necessary, therefore, to show that all of the conspirators knew the other conspirators. So long as the entire group is acting in concert and with knowledge that a combination exists, and are doing things which are in furtherance of the purposes of the combination, that makes out an unlawful combination, even though the things that the various members of the group are doing or did do are or were different one from the other.

218. In other words, there may be a combination including one central person or control group. This center may have various branches going in different directions and doing different things. These branches might not help nor be associated with each other, but if what each of the various branches did was calculated to promote the common purposes of the center, then the whole thing, the center and all of its branches, would constitute a single combination, the proof of which is essential to support a conviction. The second element of the crime as charged is the accomplishment of an unlawful object by unlawful means.

219. Now, if you will further refer to the information, you will find that the State alleges that the ultimate purpose of the claimed combination was unlawful and the means by which the combination intended to accomplish its purpose was unlawful. That is, the information alleges the persons named therein combined to offer money to police officers concerned in the administration of justice with intent to illegally influence the behavior of such police officers in their offices to the end that illegal gambling establishments and illegal liquor establishments might be permitted to operate in the counties of Hartford and New Haven, and in pursuance of the combination did commit overt acts in furtherance of and to effect the object of the conspiracy. That, in the main, is what the information alleges to have been the ultimate purpose of the claimed combination.

220. Now, to offer money, as alleged in the information, by means of a conspiracy is unlawful. We have in our State a statute which provides that any person concerned in the administration of justice who takes anything to influence his behavior in office, and any person who gives or offers anything to any person concerned with intent to influence his behavior in his office, shall be punished. Those excerpts come from our statute on bribery.

221. Now, there is no claim in this case, ladies and gentlemen, that the officers, when they took the money that they did take, did, in fact, intend to allow illegal gambling establishments and illegal liquor establishments to be operated in the New Haven and Hartford areas, or anywhere. If the police officers had taken the money under these circumstances, that is, they had accepted money and were going to allow illegal gambling or illegal liquor establishments to operate,

they, of course, would have committed the crime of bribery. Again I say to you, however, no claim is made that these officers committed the crime of bribery. It is the claim of the State that these officers took the money only as evidence of the claimed offer of money to influence their behavior.

222. Now, as previously referred to, a pertinent provision of our bribery statute as it relates to the conspiracy alleged reads as follows: "Any person who offers anything to any person concerned with intent to influence his behavior in office" shall be punished. The mere offering of anything to a police officer with intent to influence his behavior in his office is unlawful. Therefore, if you conclude in this case that there has been a combination the purpose of which was to offer money to police officers concerned in the administration of justice with intent to influence the behavior of the police officers in their offices then such combination would be a criminal conspiracy.

223. I'll state that again. If you conclude that there has been a combination, that is, a conspiracy, the purpose of which was to offer money to police officers concerned in the administration of justice with intent to influence the behavior of those police officers in their offices, then such combination would be a criminal conspiracy.

224. A third necessary element of the crime of conspiracy as set out in the statute which I have quoted from relates to the requirement of some overt act to be done in furtherance of the conspiracy. I call to your attention the allegations in the amended information alleging certain of the overt acts. The doing of any such alleged acts as having been done in furtherance of the conspiracy would likewise be unlawful, and

I call your attention to the fact that it is not necessary that the State prove all of these overt acts alleged in the information. If they prove at least one of those overt acts and that said overt act was done pursuant to this conspiracy, to carry out the purposes of the conspiracy, that would be sufficient. And, if any of the defendants named in the information, except Licari, were in such conspiracy, even though only one of them committed the overt act, this defendant, Ralph Tropiano, alike with others, would be bound by it if they were members of the conspiracy.

225. To restate that principle in a different form, I state this to you: The gist of the offense in the crime of conspiracy is not so much in the doing of the unlawful acts which the conspiracy was organized to accomplish, but, rather, the formation of the combination between two or more persons for the purpose of doing the unlawful acts. So, it is that the crime of conspiracy is complete when the combination to commit unlawful acts is formed, and some overt act in connection therewith is done, and it is not necessary to prove that the unlawful purposes of the combination were actually accomplished or that anything other than the formation of the illegal combination was done toward accomplishing the purposes.

226. A conspiracy constitutes an offense irrespective of the number or variety of objects which the conspiracy seeks to attain or whether any of the ultimate objects are actually attained.

227. There is no duty on the State to prove that any illegal liquor establishments or any illegal gambling establishments were, in fact, opened, because the elements of conspiracy in this case are the conspiring together — that is, if you so find

— of two or more persons to commit the offense, namely, the offense of the offering of money to influence officers in their behavior in order to operate illegal gambling and illegal liquor establishments. And, as I stated, the conspiracy would be complete if it appears from the evidence that any one of the overt acts alleged in the information was committed by one of the conspirators for the purpose of effecting the object of the conspiracy.

228. A moment ago I mentioned Mr. Paul Licari, and I now explain. You could not find Ralph Tropiano guilty of the crime of conspiracy as charged unless you find that he combined with either one or more of the following who are mentioned in the information: Pasquale Guglielmo, Anthony DiBella and Alfred Amaio. It would not suffice to find against him for conspiring with Paul Licari alone, because he, Paul Licari, unlike Guglielmo, did not plead guilty, and unlike DiBella and Amaio was not found guilty. He, Paul Licari, was acquitted of this charge of conspiracy in the former trial which you have heard spoken of. So, as far as the instant trial and charge is concerned, he, Paul Licari, could not be a co-conspirator.

229. I will state that principle to you again. Because of the fact that a conspiracy consists of a combination of two or more persons, you, of course, could not logically find a single defendant such as Ralph Tropiano guilty unless you find that that single person combined or conspired with either one or more of these, Pasquale Guglielmo or Anthony DiBella or Alfred Amaio, or any combination of these three of those who are referred to in the information but are not on trial here before you at this time.

230. You will remember that I told you when I was discussing these principles of law that in order for a person to be a member of a conspiracy it is not essential that it appear that he had entered into any formal or express agreement with another that they would combine to do some unlawful act. A conspiracy is not necessarily an express agreement. It may be a mere tacit understanding. It is necessary to a conspiracy that there be a concert of action on the part of two or more persons in the doing of some unlawful act, which concert of action is the result of a combination existing among them.

231. Accordingly, it simmers down to this, that speaking generally a person becomes a member of a conspiracy if he does any act which furthers the purpose of the conspiracy with guilty knowledge and with knowledge that the conspiracy exists. So, that is the test which you must apply to this defendant who is on trial before you in order to determine whether he became a member of the conspiracy alleged, and that, of course, is assuming you find a conspiracy existed.

232. You are also to ask yourselves this: First, did this defendant, Mr. Ralph Tropiano, do anything which furthered the purpose of the conspiracy? Any act which was in pursuance of the conspiracy? You may find him guilty only if his act or acts are found by you to have been in pursuance of the conspiracy and a part of it. To be a part of the conspiracy the act must be one of the acts agreed upon by the conspirators or an act which was the ordinary and probable effect of the wrongful acts which form the purpose of the conspiracy so that the connection between them may be reasonably apparent.

233. Second, you should ask yourselves, did he do the act with guilty knowledge? That is, was it in pursuance of the conspiracy?

234. And third, when he did the act, did he have knowledge not only of what he was doing but also of the fact that a combination existed to do unlawful acts and that what he was doing was in aid of that conspiracy or combination?

235. The minimum which the State must prove against Ralph Tropiano, the accused, in order to make out a case against him is that he did some act which actually was in furtherance of the purpose of the conspiracy, and that when the did it he had guilty intent and knew that what he was doing was not so much an isolated act but rather in furtherance of the conspiracy charged.

236. If you find in this case that a conspiracy was formed to offer money, as alleged in the information, and you find that DiBella offered the money pursuant to the conspiracy, then the other members of the conspiracy would be guilty even though they were not present or took no part in turning the money over to the police officers, because the law is that the overt act necessary to activate a conspiracy may be that of any co-conspirator. Of course, if the State has failed to prove a conspiracy, this defendant cannot be connected even though you find that the money was handed over to Detective Reynolds and Detective Ahern by DiBella, nor would the paying over of the money be effective against this defendant if he is found not to be a co-conspirator.

237. Now, the existence of the conspiracy here charged and the connection, members of the jury, of this particular defendant with it cannot be established against the defendant by acts or statements of any other defendant or other persons done or made in his absence and without his knowledge or authority. Such acts or declarations do not involve him unless

and until it has been proved by evidence other than such acts or declarations beyond a reasonable doubt that he is a member of the conspiracy.

238. The declarations of a conspirator are admissible and are to be considered by you against a co-conspirator only if there is independent evidence of the existence of a conspiracy, and if the declaration is in furtherance of the conspiracy. However, when and if the State proves that he has become a member of the conspiracy, such declaration and acts of other conspirators or the commission of overt acts by other co-conspirators are his responsibility. But, he first has to be connected by the evidence to the conspiracy.

239. Now, I do not intend to review the evidence with you because counsel has spent about three hours this morning in arguing their respective claims, and they — that is, counsel for the State, Mr. Sperandeo, and counsel for the accused, Mr. Jacobs,—certainly adequately and thoroughly and fully argued all of the evidence. The State claims in this case, as you know by now, that the criminal design to conspire originated with Guglielmo as a result of a talk or talks that he had with DiBella and that he then approached Officer Reynolds. Thereafter, it is the claim of the State that Guglielmo brought DiBella and Reynolds together. Following this meeting, the State now claims that the defendants named in the information, but specifically Amaio and Tropiano, were identified with the conspiracy.

240. And, it is the claim of the State that these persons named in the information and mentioned now did combine and conspire to offer money to police officers with intent to illegally influence the behavior of said police officers in their

offices to the end that illegal gambling establishments and illegal liquor establishments might be permitted to operate.

241. The State claims, it has proven beyond a reasonable doubt that this accused, Mr. Ralph Tropiano, was a conspirator and that the conspiracy was formed to offer a bribe to the police officers as alleged in the amended information.

242. Now, the defendant Ralph Tropiano, members of the jury, did plead not guilty to the information, and, thereby, he denies that he is guilty of the crime as charged in the amended information, and, thus, denies the conspiracy and denies that he conspired or was any part of any conspiracy to offer any money to these officers to influence them in connection with the illegal operation of gambling establishments or the operation of illegal liquor outlets, as charged in the information.

243. In other words, he denies that with which he is charged, and, as I have said before, the burden is not upon him to prove his innocence. The burden was at the start of this case, and remained throughout this case, on the State to prove the accused guilty as charged beyond a reasonable doubt.

244. By way of a brief summary I will say this to you, and it is only a summary: The main questions upon which you will have to pass are three in number. First, has the State proved beyond a reasonable doubt that a combination or confederation such as alleged in the information existed?

245. Second, has the State proved beyond a reasonable doubt that the purposes of that confederation was to offer money to police officers concerned in the administration of

justice with intent to illegally influence the behavior of such police officers in their offices?

246. And, third, has the State proved beyond a reasonable doubt that Mr. Ralph Tropiano became a member of that conspiracy or confederation either by express agreement or by doing some act or acts which were in furtherance of the conspiracy with guilty knowledge or intent and with knowledge of the conspiracy?

247. It is your obligation to consider this defendant's case separately from all the others named upon the basis of the evidence or the lack of evidence. All of the evidence here produced in the trial of this case against Mr. Tropiano alone and no other evidence is to be considered and taken into consideration by you in passing upon his guilt or innocence. But if on all of the evidence you find that the State has failed to make out a case beyond a reasonable doubt that this defendant, Ralph Tropiano, was a member of the conspiracy as charged, then it is your duty to find him not guilty regardless of what the plea or verdict was as to any other defendant that is named in the information.

248. If you find that the State has made out a case beyond a reasonable doubt as to this defendant, then it is your duty to return a verdict of guilty as to him regardless of what your verdict may be as to any other defendant.

249. Your foreman or forelady will have to be prepared to answer orally either guilty or not guilty as to this defendant when you return. So, it is that in the course of your deliberations you must determine, as to this defendant, whether you are satisfied beyond a reasonable doubt, that, in accordance with the principles of law which I have given to you in this

charge, that Ralph Tropiano was a member of the conspiracy charged in the information. If you are so satisfied your verdict as to him is to be that of guilty. If you are not so satisfied your verdict as to him is to be that of not guilty.

250. Now, as this case is given to you for determination, ladies and gentlemen, I say to you that you are not to let sympathy for or prejudice aaginst any of the parties in any way influence your deliberations or your decisions in any form. Each case which is tried is apt to have an element or elements in it which might arouse sympathy or prejudice, and every trier of fact, whether that trier of fact be a Judge or member of a jury, must be careful to exclude such considerations from his or her mind. Remember that we are here to administer justice and not sympathy or prejudice.

251. You will recall on September 29, 1965, in accordance with our statute, you took this oath as you became jurors in this case:

> "You solemnly swear by the name of the ever-living God, that you will, without respect of persons or favor of any man, well and truly try, and true deliverance make, between the state of Connecticut and the prisoner at the bar, when you shall have in charge, according to law and the evidence before you; your own counsel, and your fellows, you will duly observe and keep; you will speak nothing, to any one, of the business or matters you have in hand; but among yourselves, nor will you suffer any one to speak to you about the same, but in court; so help you God."

That was the oath that you took on that date.

252. When you retire you should first choose a foreman or forelady whose duties it will be to preside over your delib-

erations and to report your verdict for you, with your assent, when the verdict is agreed upon.

253. You will begin your deliberations when there is sent to you into the jury room the information and all exhibits, with the exception of three which I will refer to in a moment; all of the exhibits that have been introduced in evidence except three of them. You are privileged to make such use of the exhibits as you may need to in the proper course of your deliberations.

254. I remind you that your verdict as to this defendant must be unanimous; it must be concurred in by all twelve of your number, and when you have agreed upon a verdict you will notify the Sheriff when your are ready to report. You will then be called into the courtroom and be inquired of as to what your verdict is as to this accused.

255. Now, members of the jury, all of the exhibits will be sent into your jury room, with three exceptions, as I have indicated. The tapes and the recording and play-back machine —these the Court is not going to send in to you. However, if during your deliberations you would desire to have any one or more of those tapes replayed, if you will notify the Sheriff in charge, I will have you brought out here and we will arrange to have whatever tape or tapes you desire replayed, should you want to have any replayed. I call your attention, however, that there is in evidence typed sheets, the exhibits which actually reflects transcripts of those tapes, and you will have that exhibit with you in the jury room. That may prove to be sufficient, but if not, and you want the tapes replayed, on notice, as I have indicated, I will be glad to have the tape or tapes played for you.

256. Now, you will recall that there was money introduced into evidence. I think it is said to be $2,000 in money. That is still in the Clerk's possession by my order. I am not going to send it into the jury room. I do not see any particular need to place the care of that sum upon you, but there is no dispute about the fact that this money was turned over to the police officers. However, if there is any reason you people would like to examine that exhibit of money, you may notify the Sheriff, he will contact me, and I will see that it is delivered to your jury room. However, there are photographs of the money in evidence which will be sent to you.

257. Now, what I have said just about covers everything that I have in mind to say to you ladies and gentlemen. The case is now in your hands for your deliberations thereon.

OPINION OF CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT *v.* RALPH TROPIANO

KING, C. J., ALCORN, HOUSE, GRILLO and RUBINOW, Js.

The defendant was convicted of the crime of conspiracy, involving the attempted bribery of police officers to secure protection for illegal gambling and liquor activities. There was evidence disclosed from which the jury could reasonably conclude that the alleged co-conspirators arranged a conference between the defendant and one of the officers at which the defendant's incriminating statements identified him as an active participant in the conspiracy. Thus, the defendant's motions for a directed verdict, to set aside the verdict, and to strike certain evidence were properly denied.

The defendant contended that the state's proof established five separate conspiracies. In actuality, the separate overt acts proved were individual facets of the single conspiracy alleged. The charge of the court concerning the state's burden of proving the conspiracy alleged was adapted to the issues and adequate for the guidance of the jury.

The charge adequately identified the alleged co-conspirators and charged the jury that only the acts and declarations of co-conspirators could be used against the defendant. The court was not required to adopt the language of the defendant's request to charge.

The court did not err in admitting certain statements of co-conspirators made during the pendency of the conspiracy. Although the statements referred, in part, to past facts, they were part and parcel of the discussions on the bribe payments, were made to reassure the officer of the soundness and prospective completion of the proposition made to him, were in furtherance of the conspiracy, and were based on personal knowledge.

Alhough certain questions asked by the defendant in cross-examining G were admissible to attack the witness' credibility on the ground of motive, interest or bias, the rulings excluding them were harmless because the verdict need not have been affected even if the jury chose to discredit his entire testimony, further cross-examination with the same objective was unrestricted, and the witness' status as a confessed co-conspirator testifying for the state furnished a basis for a conclusion by the jury that he was biased or interested.

The defendant's motion to quash or dismiss the information on the ground that the bench warrant for his arrest had been

issued without a showing of probable cause supported by oath or affirmation was not made until nineteen months after his plea of not guilty to the original information and ten months after his plea of not guilty to the amended information. Waiver of the illegality of an arrest and consent to the jurisdiction of the person can, in the absence, as here, of some mitigating factor, rest on the record of the plea of guilty or not guilty. Thus, the court properly denied the motion.

The attempt to show reversible error by culling a single word from the court's charge failed in the absence of a showing that it was reasonably probable that it misled the jury.

Argued May 7 — decided September 24, 1969.

Information charging the defendant and others with the crime of conspiracy, brought to the Superior Court in New Haven County and tried to the jury before *Meyers, J.*; verdict and judgment of guilty and appeal by the defendant. *No error.*

The appellant filed a motion for reargument which was denied.

Ira B. Grudberg, with whom, on the brief, was *Howard A. Jacobs*, for the appellant (defendant).

David B. Salzman, assistant state's attorney, with whom, on the brief, were *Arnold Markle*, state's attorney, and *Richard P. Sperandeo*, assistant state's attorney, for the appellee (state).

ALCORN, J. The defendant was convicted by a jury of the crime of conspiracy in violation of General Statutes § 54-197 and has appealed from the judgment rendered on the verdict and from the denial of his motions to set aside the verdict and

for judgment in accordance with his motion for a directed verdict. The information on which he was tried alleged, in substance, that between September 1, 1963, and February 20, 1964, he conspired with Anthony F. DiBella, Pasquale Guglielmo, Alfred J. Amaio and Paul Licari to offer money to police officers to secure protection for illegal gambling and liquor activities. We have previously sustained the conviction of DiBella and Amaio for their part in the same conspiracy, the nature of which has been summarized in the opinion in that case. *State* v. *DiBella*, 157 Conn. 330, 254 A.2d 477. We shall confine our factual recital in the present case to matters pertinent to the defendant's participation in the conspiracy and the various errors assigned in the proceedings which terminated in the verdict of the jury.

Among the thirty-five assignments of error are thirteen which attack findings made by the court. In passing upon the latter we are confronted with a variety of errors assigned in five distinct findings. In advance of the trial to the jury, the defendant made a motion to suppress evidence, a motion to dismiss or quash the information, a motion to quash or strike the amended information, and a motion to sequester witnesses. In disposing of each of these motions, the court, sitting without a jury, made separate findings of fact which can be corrected only as provided in Practice Book §628. Following the appeal, the court made a finding as required by Practice Book §635 which can be corrected as provided in §628 so far as that section is applicable. Practice Book §636. This requires consideration of whether the finding relating to the jury trial includes the material facts concerning which "there was evidence upon the basis of which the jury could reasonably find a certain fact proven, and the appellant

claimed to have proved it." Maltbie, Conn. App. Proc. §160, p. 198. We have examined the assignments of error addressed to the five separate findings in the light of these principles and conclude that no corrections material to our decision are required.

The remaining assignments of error are prolix and confusing. By a repetitious admixture of attacks on rulings on evidence on the charge of the court and on rulings on various motions, the defendant claims essentially, as set forth in his brief, that the court erred in refusing to direct a verdict of not guilty; that there was a fatal variance between the information and the proof; that the court erred in failing to charge the jury that acts and statements of witnesses not made in the presence of the defendant could not be used against him; that the court erred in admitting hearsay declarations of co-conspirators, in limiting cross-examination of state's witnesses, in denying the defendant's motion to sequester witnesses, and in refusing to charge as requested; and that the defendant was illegally arrested on a warrant issued without probable cause supported by oath or affirmation.

I.

After the state and the defense had rested, the defendant moved for a directed verdict on the ground that the evidence was insufficient to prove the defendant's guilt beyond a reasonable doubt. The court denied the motion, and that denial is assigned as error. After the jury had returned a verdict of guilty, the defendant moved to set aside the verdict and for judgment in accordance with his motion for a directed verdict. This motion also was denied, and that denial is assigned as error.

The correctness of the court's ruling on each motion must be tested by the evidence printed in the appendices to the briefs. *State* v. *Mortoro*, 157 Conn. 392, 393, 254 A.2d 574; *State* v. *Cyuro*, 156 Conn. 391, 397, 242 A.2d 734, cert. denied, 393 U.S. 937, 89 S. Ct. 301, 21 L. Ed. 2d 274. It was the state's burden to prove that the defendant did some act which actually was in furtherance of the purposes of the general conspiracy and that, when he did it, he had a guilty intent and knew that what he was doing was a part of a general scheme to commit some of the unlawful acts alleged in the information. *State* v. *Hayes*, 127 Conn. 543, 563, 18 A.2d 895.

From the evidence before them the jury could reasonably have concluded that a gambling operation, involving men from New Haven, had been in the pending stage for about a year prior to September 17, 1963. On that date, Guglielmo approached Francis Reynolds, a detective in the West Hartford police department, with an offer of between $10,000 and $12,000 for police protection of the operation. Thereafter DiBella entered the picture, and extensive discussion followed for a considerable period of time with the objective of arranging for protection of illegal operations in New Haven as well as in West Hartford by enlisting the aid of Stephen P. Ahern, a sergeant in the New Haven police department. On January 30, 1964, DiBella informed Reynolds that the payoffs would be made from the defendant, who was the "top man", to DiBella, to Reynolds and from him to Ahern. After discussing the division of the payments, DiBella went to a telephone and on his return said: "Come on, we are going to New Haven." Reynolds and DiBella then drove to a restaurant in New Haven where they met Licari and the defendant, and

DiBella introduced Reynolds as the man he had been "talking about the deal with." Licari and DiBella then left Reynolds and the defendant alone in a booth at the restaurant, and the defendant told Reynolds: "The only thing I want from Ahern are the crap games. Horses can come later."

Reynolds asked the defendant how much Ahern was to get, and the defendant said: "Quote a figure." Reynolds quoted $475 to $500 a week, and the defendant voiced approval of the amount suggested. The defendant said that he wanted the crap games operated every night of the week otherwise they would "get cold and the people would go to Bridgeport." Following this conversation, Licari and DiBella returned to the booth, and, after discussion concerning Licari, who was going to run the crap games, DiBella and Reynolds went home.

From the evidence recited the jury could properly conclude that the defendant's own conduct clearly identified him as an active participant in an illegal conspiracy. *State* v. *Hayes*, supra. The court did not err in refusing to direct a verdict of not guilty or in denying the motion to set aside the verdict.

At the conclusion of the evidence, the defendant moved to strike certain of the testimony of Guglielmo, Reynolds and Ahern because the state had not offered independent evidence of the conspiracy and the defendant's connection with it sufficient to make the testimony admissible. Recitation of further facts is unnecessary since it is apparent that the court did not err in denying the motion.

II.

The claim made in the brief that the proof at the trial was at fatal variance with the information is not specifically assigned as error and consequently is not properly raised. Practice Book § 651. Argument on the point insinuates itself into the case through the errors assigned in the denial of the motions to direct and to set aside the verdict, and through an assignment that the court erred in refusing eleven requests to charge, four of which related to the distinction to be drawn between a single conspiracy and several conspiracies. The purport of the argument is that the court should have charged that the state was required to prove a single conspiracy in order to convict the defendant and that a conviction could not be had if the jury concluded that the several defendants engaged in separate conspiracies even though one conspirator engaged in all of them.

The amended information charged the defendant with conspiring with the other named persons to offer money to police officers to influence their conduct so that illegal gambling and liquor operations could be conducted in Hartford, New Haven and other counties and specified ten overt acts in furtherance of that conspiracy. The finding is that the state offered evidence to prove and claimed to have proved nine of the overt acts alleged. The defendant does not contend otherwise but asserts that the state's claims of proof established five separate conspiracies. In an endeavor to support this claim, the defendant utilizes overt acts which, in actuality, are individual facets of the single conspiracy charged.

The defendant makes no claim that he offered to prove, or proved, multiple conspiracies. Instead, he contends that

"based upon the State's evidence" the court committed error in refusing his requests to charge concerning the state's burden of proving the single conspiracy alleged. We have examined the charge on this phase of the case and conclude that it was adapted to the issues and adequate for the guidance of the jury. *Berniere* v. *Kripps*, 157 Conn. 356, 358, 254 A.2d 496; *Lopes* v. *Connecticut Light & Power Co.*, 145 Conn. 313, 315 142 A.2d 135.

III.

Detective Reynolds had immediately reported to his superior at police headquarters the proposition made to him on September 17, 1963, by Guglielmo. Thereafter, meetings which he had with the conspirators were under the surveillance of the West Hartford police, and tape recordings were made of telephone conversations which he had with DiBella. These recordings and the stenographic transcriptions made of them were introduced into evidence. When they were introduced, counsel for the defendant requested the court to charge the jury that Reynolds' parts of the conversations were not binding on the defendant because Reynolds was not a co-conspirator and had said nothing in such a capacity. Counsel for the defendant also filed a written request to charge that "[t]he acts and declarations of Reynolds and Ahern, outside the presence of this defendant, are not evidence against him."

The substance of the conversations concerned the defendant's role in the conspiracy, and the defendant concedes that the court did not err in receiving the recordings and transcripts in evidence.

Although Reynolds' part in the conversations was not admissible to prove the truth of any assertions made by him, since he admittedly was not a co-conspirator, nevertheless his portion of the conversation was admissible for the limited purpose of giving meaning and coherence to DiBella's statements. See *United States* v. *Morello*, 250 F.2d 631, 634 (2d Cir.); 7 Wigmore, Evidence (3d Ed.) §§ 2097, 2099. The admission of the entire conversation tended to eliminate the possibility that the jury would interpret the meaning of DiBella's statements out of context rather than to prejudice the defendant.

Cautionary instructions concerning the effect which the jury should give to statements made by DiBella as distinguished from those made by Reynolds were called for, however. *United States* v. *Morello*, *supra*. Nevertheless, the court was not required to adopt the exact language of the defendant's request so long as it gave the jury a clear understanding of the issue and a proper guidance in determining it. *State* v. *Alterio*, 154 Conn. 23, 27, 220 A.2d 451, and cases cited.

An examination of the charge discloses that the court told the jury specifically that the information charged the defendant with conspiring with Guglielmo, DiBella and Amaio, to the exclusion of the police officers and Licari. The court explained that Licari had been tried and acquitted of conspiracy previously and that the state claimed that the officers took money only as evidence of the conspiracy alleged. The jury were told that acts or declarations of a co-conspirator did not involve the defendant until he had been proved to be a member of the conspiracy by other evidence but that once he had been proved to be a member of the conspiracy the declarations of a co-conspirator in furtherance of the conspiracy were admissible against him.

It was thus made clear to the jury, by specific identification, who the conspirators were alleged to be. Not only were the officers excluded from that category but the charge abundantly emphasized to the jury that the part which the officers played in the scheme of things was to bring the conspirators to justice. The charge of the court adequately alerted the jury to the fact that only the acts and declarations of co-conspirators in furtherance of the conspiracy could be used against the defendant. This statement necessarily excluded the acts and declarations of the officers, and this was the substance of the defendant's request to charge. *United States* v. *Morello, supra.*

IV.

The defendant assigns error in rulings of the court in admitting into evidence statements made by co-conspirators.

Reynolds testified to a conversation with Guglielmo in which Guglielmo said that the deal was still on. Reynolds asked him if he was serious, and Guglielmo said, "You don't think I would be kidding about something like this?". After a discussion about the money involved and the division of it, Reynolds asked if Guglielmo had had any further meetings in New Haven, and he said, "No. I don't want to be seen with that type of crowd." As the answer continued, the defendant's counsel objected that it was narrative and not within the co-conspirators' exception, but the court allowed the answer to be completed.

Included in the recordings of telephone conversations, and the stenographic transcriptions thereof already referred to, were statements made by DiBella in a conversation with Reynolds in which DiBella said, "Well, you see, Whitey

[meaning Tropiano]—nobody is ever gonna catch him. Whitey has got operations going that he ain't got no part of himself and they're running because no matter how many times they catch his men his men are—they'll die." DiBella also said, "— you can never tell whether it's part of his [Tropiano's] operation. But, without him the town don't run." The defendant's counsel objected to both statements on the ground that they constituted narrative and were not in furtherance of the conspiracy, and the court overruled the objection.

Included in the recordings and the stenographic transcriptions was a statement by DiBella to Reynolds, "That's right. He'll—he'll honor Mr. Ahern in his own particular way—it'll be a crude way—he'll say 'I don't know—you know what he wants, he's waiting for me to get myself off guard, but he ain't gonna catch me.'" The defendant's counsel objected on the ground that the statement constituted speculation on DiBella's part and was his interpretation of the operation of someone else's mind, and the court overruled the objection.

The defendant now argues that the statements quoted were not made in furtherance of the conspiracy and so were not admissible under the so-called co-conspirators' exception to the hearsay rule. The rule that any declaration made by a co-conspirator, pursuant to the common object of the conspiracy and in furtherance of it, is admissible against all of the conspirators once the combination is established was enunciated by this court over one hundred years ago in *Cowles* v. *Coe*, 21 Conn. 220, 234. In more recent times, the requirement that the declaration be in furtherance of the conspiracy has been the subject of discussion. Professor Edmund M. Morgan in "The Rationale of Vicarious Admissions," 42 Harv. L. Rev. 461, has urged that that requirement of the rule be

eliminated since the trustworthiness of the declaration is guaranteed by the circumstances that (p. 481) "the fact stated is consciously against the interest of the declarant." See also Model Code of Evidence rule 508 (b); Uniform Rule of Evidence 63 (9) (b), 9A U.L.A.; Levi, "Hearsay and Conspiracy, A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule," 52 Mich. L. Rev. 1159, 1167; note, "Developments in the Law [of] Criminal Conspiracy," 72 Harv. L. Rev. 920, 985.

The defendant relies heavily on *Krulewitch* v. *United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790, in which the court appears to reject Professor Morgan's suggestion, although the conversation involved in that case took place after the conspiracy had ended and concerned an anticipated criminal prosecution. Any detailed discussion of the soundness of the portion of the rule which requires statements of co-conspirators to be "in furtherance of the conspiracy" is, however, unnecessary in the present case. In the first place, the statements objected to were clearly made during the pendency of the conspiracy, and the defendant does not contend otherwise. Furthermore, even though the statements, in part, may be interpreted to refer to past facts, they were part and parcel of the discussions concerning the bribe payments and were obviously made for the purpose of reassuring Reynolds of the soundness and prospective completion of the proposition made to him. Any references to past facts were natural and pertinent to the conspiracy and were therefore in furtherance of it. *United States* v. *Pardo-Bolland*, 348 F.2d 316, 324 (2d Cir.), *cert. denied*, 382 U.S. 944, 86 S. Ct. 388, 15 L. Ed. 2d 353; *United States* v. *Annunziato*, 293 F.2d 373, 380 (2d Cir.), *cert. denied*, 368 U.S. 919, 82 S. Ct. 240, 7 L. Ed. 2d 134. The

statements which are claimed to be speculation and interpretation of the operation of someone else's mind by DiBella were, even if characterized as expressions of opinion, based on DiBella's own personal knowledge. See *Stephanofsky* v. *Hill*, 136 Conn. 379, 382, 71 A.2d 560. Like the other statements they were calculated to reassure Reynolds of the soundness of the proposition made to him. The court did not err in admitting the testimony.

V.

The defendant assigns error in rulings of the court during his cross-examination of witnesses for the state.

During cross-examination of Reynolds, the witness stated that his recollection was exhausted. Defense counsel then asked Reynolds when he had last looked at any records, transcript or otherwise, concerning the subject under inquiry, and Reynolds said he could not recall. Defense counsel then asked whether the witness' recollection was refreshed "whenever it was you looked over your notes." The state objected that "[i]t's recollection that's being refreshed at this time, not at some other time," and the court sustained the objection. The ruling was correct. Another ruling improperly conjoined in this assignment requires no discussion.

In cross-examining Guglielmo, defense counsel questioned him concerning a statement which he read from the transcript of a former trial and which was not an exhibit. On objection by the state, the court stopped the reading, stating that counsel could not read from the record "without turning in the record." The defendant now claims that the ruling balked him from showing a prior inconsistent statement of the witness. The

defendant does not point to the alleged inconsistency, and the transcript discloses none.

In cross-examining Reynolds concering the dates of several conversations, the witness said he could not recall but could answer exactly if allowed to look at his notes. Defense counsel did not allow the witness to refresh his recollection from his notes, and the court refused to permit a repetition of questions which the witness had said he could not answer from his present recollection. There was no error in that exercise of the court's discretion.

On direct examination Reynolds had testified that he met Sergeant Ahern when he arrived at a parking lot for a meeting with DiBella on February 13, 1964. In a previous trial he had testified that Ahern drove in after he and DiBella had arrived. This variance in his testimony was pointed out by defense counsel in cross-examination. Defense counsel now makes the footless complaint that the court, after examining a report made by Reynolds to his superiors, which included the details recorded in a memorandum made by him of the meeting of February 13, 1964, both of which had been marked for identification, found no inconsistency in them beyond what was already in evidence and therefore refused to allow further cross-examination on the incident by reference to the documents.

Before the trial of the defendant began, Guglielmo had pleaded guilty to the same crime as that with which the defendant was charged and had received a suspended sentence. At the start of the defendant's trial, the court informed the jury that Guglielmo had pleaded guilty. This was the fact, although that plea was entered after an earlier not guilty plea. On cross-examination, defense counsel asked Guglielmo

whether, before trial, he had pleaded not guilty; whether he was sentenced "after the last case was disposed of"; and whether, before the last case started, he had conferred with the state's attorney as to what his testimony would be. The state's objection to each question was sustained. Defense counsel stated as the ground for admissibility: "I am entitled to go into the question of motive for testimony."

The questions were admissible for the purpose of attacking the witness' credibility on the ground of motive, interest, or bias. *State* v. *Luzzi*, 147 Conn. 40, 46, 156 A.2d 505. Subsequent cross-examination indicates that the defendant's apparent objective was to indicate to the jury some motive, bias, or interest in the witness by suggesting that promises of leniency were made to him which were productive of the change of plea and which resulted in the suspended sentence. The rulings of the court excluding the questions for the purpose stated were erroneous. In order to constitute reversible error, however, the rulings must have been both wrong and harmful. *State* v. *Fredericks*, 154 Conn. 68, 72, 221 A.2d 585. If the record discloses that the rulings could not reasonably have affected the verdict, they were not harmful and hence not reversible error. *DeCarefal* v. *Colonial Trust Co.*, 143 Conn. 18, 21, 118 A.2d 798.

Guglielmo's direct testimony, which covers fifty-four pages of the trial transcript, shows that Guglielmo was offered by the state principally to explain Reynolds' connection with the case. His testimony under cross-examination by the defendant, which covers 122 pages of the trial transcript, dealt with his long acquaintance with, and proposal to, Reynolds, his introduction of Reynolds to DiBella, his talks with DiBella and Reynolds regarding Reynolds' proposed activity, and his

express denial that he either offered any money to Reynolds or expected to receive or actually received anything from DiBella for approaching Reynolds. His testimony did not tend toward proof of the crime charged, and the verdict need not have been affected even if the jury chose to discredit his entire testimony. Under those circumstances the rulings complained of were harmless. *DeCareful* v. *Colonial Trust Co.*, *supra*.

Beyond that, however, the transcript discloses that cross-examination continued after the objections to the questions in issue were sustained, during which, over objections by the state, and subsequent to the rulings complained of, the defendant was permitted to ask Guglielmo the direct question whether any promises had been made to him, and the witness answered, "There was no promises made." Thereupon, the defendant dropped the subject, made no attempt to test the answer he had received, and continued his cross-examination, confining it to other matters. The defendant does not now claim that any promises were actually made to Guglielmo or that cross-examination to test his express denial of any promise was in any way restricted. Nor did the defendant attempt to question the witness concerning any circumstances surrounding either the pleas or the sentence which would tend to suggest even a hope or expectation of leniency productive of a motive or interest likely to affect Guglielmo's credibility. Our examination of the transcript discloses no curtailment of proper cross-examination which would render the rulings complained of harmful or prejudicial. See cases such as *People* v. *Smith*, 26 Cal. 2d 285, 858, 161 P.2d 941; *People* v. *Miceli*, 101 Cal. App. 2d 643, 647, 226 P.2d 14; *People* v. *Stone*, 89 Cal. App. 2d 853, 860, 202 P.2d 333.

Finally, Guglielmo's position as a self-confessed conspirator testifying for the state furnished a basis upon which the jury could, if it decided to do so, determine that he was a biased or interested witness. 3 Wigmore, Evidence (3d Ed.) § 967. The court, in effect, so charged, clearly described Guglielmo's status to the jury, and charged them that it required that they carefully scrutinize his testimony. The defendant received apparently free and full answers to his questions regarding Guglielmo's conferences with the state's attorney concerning his testimony. When viewed from every angle the rulings complained of were harmless.

VI.

Before the trial to the jury began, the defendant made a motion to sequester witnesses. The court denied the motion, and the denial is assigned as error. The motion, which was in writing, stated, "The defendant Ralph Tropiano moves that the witnesses for the State be sequestered." No reasons were stated. In argument of the motion the defendant claimed that the essence of the state's case involved conversations between Guglielmo and Reynolds, Guglielmo and DiBella, and DiBella, Reynolds and Ahern. The claim was that sequestration of the witnesses was necessary in order to prevent them from unconsciously or consciously shaping their testimony. A similar motion was made and ruled on in *State v. DiBella*, 157 Conn. 330, 342, 254 A.2d 477, and the same principles as in that case apply here. Furthermore, in the present case, the court was cognizant of the fact that, as a result of the prior case, the witnesses named could be fully aware of the testimony elicited at that trial to which any coaching in the present case could add little. The court did not err in denying the motion. *State* v. *DiBella, supra.*

VII.

The defendant assigns error in the denial of his "motion to dismiss and/or quash" the information on the ground that the bench warrant under authority of which he was arrested was issued without a showing of probable cause supported by oath or affirmation.

At the hearing on the motion which took place prior to the trial, the court found that the defendant was arrested on February 20, 1964, by virtue of a bench warrant issued by a Superior Court judge on that date. Following the procedure which was then customary, the warrant was issued without oath or affirmation on the oral representation by the state's attorney that he had reasonable grounds to believe that the crime charged had been committed within the jurisdiction. Counsel entered a general appearance for the defendant, and, on March 3, 1964, the defendant pleaded not guilty to the charge made against him. The information was later amended, and, on November 17, 1964, the defendant again entered a not guilty plea to the amended information. The motion to dismiss and/or quash the information was not made until September 20, 1965, the day preceding the start of the jury trial. Thus, no question was raised as to the validity of the arrest until nineteen months after issue was joined on the original information by a not guilty plea and ten months after a like plea to the amended information.

In *State* v. *Licari*, 153 Conn. 127, 214 A.2d 900, we said (p. 129) that an attack such as that now made on the court's jurisdiction of the defendant's person is one which should be made before a plea of guilty or not guilty and (p. 130) that a failure to move in timely fashion is strong evidence of consent to jurisdiction of the person (p. 131) although on the

record in that case we could not, as a matter of law, find such consent. In *State* v. *Orsini*, 155 Conn. 367, 379, 232 A.2d 907, we said that the invalidity of the bench warrant was waived by a failure to raise the issue during the lapse of almost a year between the date of the arrest and the date of defendant's cognizance of the existence of the issue. See also *State* v. *Darwin*, 155 Conn. 124, 144, 230 A.2d 375, rev'd on other grounds, 291 U.S. 346, 88 S. Ct. 1488, 20 L. Ed. 2d 630.

We have so recently discussed the proper and timely way in which to raise the issue attempted to be raised by the defendant's motion to dismiss that the discussion need not now be repeated. *Reed* v. *Reincke*, 155 Conn. 591, 236 A.2d 909. "Proof of waiver of the illegality of an arrest and consent to the jurisdiction of the person can, and indeed does, in the absence of some mitigating factor not present here, rest on the record of the plea of guilty or not guilty." *Id.*, 601.

The court did not err in denying the motion to "dismiss and/or quash" the information.

VIII.

The defendant assigns as error that the court refused eleven written requests to charge. Four of them related to the requirement that the state must prove a single conspiracy. These we have discussed in connection with the claim of variance. One, we have discussed in connection with the introduction into evidence of the tape recordings. Five others receive only cursory treatment in the defendant's brief, and

an examination of the charge discloses that it substantially complied with the requests involved.

The one remaining attack on the charge concerns the subject of the defendant's failure to testify. The defendant filed a written request that the court charge as follows: "The defendant is not required to testify on his own behalf. The law gives him the right not to testify. Here the defendant Ralph Tropiano exercised his right not to testify. I instruct you that you must not consider the defendant's exercise of his right not to testify as evidence of guilt. You may draw no inference of any kind against the defendant because he did not testify." The court charged as follows: "From the fact that a man is presumed to be innocent, the next principle follows; namely, that the burden of proof is upon the State throughout the trial to prove an accused guilty and does have to prove his innocence. That is to say, it is incumbent upon the State to carry the burden of proving its case in all its essential elements before a verdict of guilty may be rendered. Mr. Ralph Tropiano was under no obligation to go forward with witnesses to defend himself or to take the stand. No presumption, no inference of any kind should be drawn against him because he hasn't undertaken to testify or because he has not called witnesses in his own behalf. The accused had the right to testify if he so elects. He has the right to call witnesses and explained [sic] the case from his standpoint, but no inference of guilt should be drawn against him for the reason alone that he does not elect to exercise either of those rights; because, as I have said, he is presumed to be innocent and the State has upon it impressed by law the burden of overcoming that presumption and establishing beyond a reasonable doubt every essential element of the crime charged. And, until that is

established by evidence beyond a reasonable doubt, the presumption of innocence is not overcome."

At the conclusion of the charge no exception was taken other than to the court's failure to charge as requested. Consequently, the error now assigned raises only the question whether the charge sufficiently covers the subject matter of the request. *McMahon* v. *New York, N.H. & H.R. Co.*, 136 Conn. 372, 375, 71 A.2d 57. "The failure to charge in the exact language of the requests is not error." *Mace* v. *Conde Nast Publications, Inc.*, 155 Conn. 680, 687, 237 A.2d 360.

The defendant now would complain of the court's use of the word "alone" and its failure to tell the jury that the defendant "had the right not to testify." He urges that the implication is that no inference from his failure to testify could be drawn unless it is related to other factors in relation to his silence. Quite aside from the fact that the claim now made was not made the basis of an exception at the conclusion of the charge, the attempt to assert reversible error by culling a single word from the charge must fail unless it is reasonably probable that the jury were misled by it. *Penna* v. *Esposito*, 154 Conn. 212, 215, 224 A.2d 536. Considering the charge on this issue as a whole, as we must, we find no reasonable possibility that the jury were misled. The charge concerning the defendant's failure to testify was fully adequate for the guidance of the jury. *Michaud* v. *Gagne*, 155 Conn. 406, 412, 232 A.2d 326.

There is no error.

In this opinion the other judges concurred.

PETITION FOR WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF KANSAS

Petitioner prays for a Writ of Habeas Corpus pursuant to 28 U.S.C., Sec. 2241.

1. Petitioner is presently serving two concurrent twelve year sentences for violation of and conspiracy to violate the Hobbs Act, 18 U.S.C.A., Sec. 1951. Said conviction occurred on November 15, 1968. Subsequent thereto, Petitioner was convicted by Jury in the Superior Court in New Haven County, Connecticut, for the crime of conspiracy in violation of General Statutes, Sec. 54-197. He was sentenced to serve three to six years in the Connecticut State Penitentiary commencing upon the expiration of the Federal sentence, which he is now serving. His timely appeal was denied by the Supreme Court of the State of Connecticut on October 29, 1969. A Petition for Writ of Certiorari to the United States Supreme Court was denied on June 8, 1970.

2. Warden Robert I. Moseley, the Respondent herein, is the Warden of the Federal Penitentiary at Leavenworth, Kansas, and, under the present posture of the instant case, as hereinabove outlined, is to remand Petitioner, upon the expiration of his Federal sentence, to the Connecticut State Prison so that the serving of the said sentence may be commenced.

3. The conviction and sentence, pursuant to which Petitioner is to be remanded to the Connecticut State Prison, was imposed in violation of the Due Process Clause of the

Fourteenth Amendment to the United States Constitution and of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution. The facts showing this violation are as follows:

(A.) The Trial Court's Charge With Regard To Petitioner's Election Not To Testify Was A Prejudicial Comment Thereon.

The court refused the following charge requested by Petitioner: "The Defendant is not required to testify in his own behalf. The law gives him the right not to testify. Here, the Defendant exercised his right not to testify. I instruct you that you must not consider the Defendant's exercising of his right not to testify as evidence of guilt. You may direct no inference of any kind against the Defendant because he did not testify."

The Court, in lieu thereof, charged the Jury as follows: "The Defendant was under no obligation to go forward with witnesses to defend himself or to take the stand. No presumption, no inference of any kind should be drawn against him because he hasn't undertaken to testify or because he has not called witnesses in his own behalf. The accused has the right not to testify if he so elects. He has the right to call witnesses and explain the case from his standpoint, but no inference of guilt should be drawn against him *for the reason alone* (emphasis supplied) that he does not elect to exercise either of these rights."

Petitioner contends that the words, "for the reason alone" as well as the absence of an instruction that the Petitioner had the right *not* to testify constituted a prejudicial comment

on his failure so to testify. The Connecticut Supreme Court in ruling adversely upon this contention utilized the standard as to whether or not it is "reasonably possible" that the Jury was misled by the instruction.

Petitioner submits that the charge as given constitutes or involves a constitutional error within the purview of *Griffin* v. *State of California* (380 U.S. 609, 85 S. Ct. 1229) applying the standard of error enunciated by *Chapman* v. *California* (386 U.S. 18).

(B.) Evidence Was Admitted Against Petitioner Constituting Declarations Of A Police Officer, Outside The Presence Of Petitioner And Who Was Not A Member Of The Alleged Conspiracy.

There was admitted into evidence against Petitioner tape recordings between a police officer and co-Defendant and alleged co-conspirator, one DiBella. It was apparent that the police officer had intentinoally drawn from DiBella various derogatory statements regarding Petitioner and that his purpose in so doing was to involve Petitioner in the alleged conspiracy. All of these recorded conversations were held in the absence of Petitioner. The Connecticut Supreme Court justified the admission of this evidence on the ground that the statements of the co-conspirator police officer were admissible for the limited purpose of giving meaning and coherence to DiBella's statements. Although the charge to the Jury named the alleged co-conspirators (making no reference to the police officer with whom DiBella had conversed) and instructed the Jury that once the Petitioner had been proved to be a member of the conspiracy by other evidence, then the declarations of

a co-conspirator were admissible against him, it was error to expect the Jury to disregard the police officer's incriminating statements with regard to Petitioner and to only consider them for the purpose of "giving meaning" to the statements of DiBella.

(C.) Petitioner's Counsel Was Prevented From Eliciting, Upon Cross-Examination, The Fact That A Chief State Witness Had Orginally Pleaded "Not Guilty" To The Same Crime As That With Which The Petitioner Was Charged And That His Subsequent Change Of Plea To "Guilty" Was Directly Connected To His Testimony On Behalf Of The State.

Witness Guglielmo was originally indentically charged with Petitioner. His original plea was one of "not guilty." He subsequently changed his plea to "guilty." Petitioner's counsel, upon cross-examination, attempted to elicit these facts before the Jury and to further question the witness as to his present testimony on behalf of the State as related to the imposition of sentence based upon said "guilty" plea. The State's objections to these questions were sustained. The Connecticut Supreme Court acknowledged that these Trial Court rulings constituted error but considered them harmless error utilizing the standard of whether or not the rulings could reasonably have affected the verdict. Petitioner contends that under the standard of *Chapman, supra,* this error was of Constitutional magnitude and constituted reversible error.

Wherefore, Petitioner submits that should he be remanded by the Respondent to the Connecticut State Penitentiary, he

will be restrained of his liberty in violation of the Constitution of the United States; and he, therefore, prays:

1. That an evidentiary hearing be held at which time Petitioner may submit evidence in support of the allegations contained herein;

2. That this Writ be granted and an Order be entered discharging him from custody pending his release from the Federal sentence hereinabove referred to; and

3. For such other and further relief as this Court may deem just and proper.

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UNITED STATES COURT OF APPEALS
For The Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of November one thousand nine hundred and seventy-one.

Present:

Hon. Henry J. Friendly, *Chief Judge*
Hon. Wilfred Feinberg, *Circuit Judge*
Hon. Oscar H. Davis, *U.S. Court of Claims.*

Ralph Toscano,
PETITIONER-APPELLANT,

v.

Robert I. Mosely, Warden, Federal Penitentiary, Leavenworth, Kansas,
RESPONDENT-APPELLEE.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-927

RALPH TROPIANO,
Petitioner,

vs.

ROBERT I. MOSELEY, WARDEN OF FEDERAL PENITENTIARY AT LEAVENWORTH, KANSAS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

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No. 71-927

RALPH TROPIANO,
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ROBERT I. MOSELEY, WARDEN OF FEDERAL PENITENTIARY AT LEAVENWORTH, KANSAS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATUTES INVOLVED

28 U.S.C. 1404 CHANGE OF VENUE.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

CONNECTICUT GEN. STATS. 54-197. CONSPIRACY.

Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement, shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both, provided, if the crime which is the object of such combination, confederation or agreement is a misdemeanor, such person shall be subject to the same penalty as is provided by statute for the commission of the misdemeanor. No officer or member of any lawful organization shall be held liable for the unlawful acts of individual officers, members or agents of such organization except upon proof of participation in or authorization of such acts or of the ratification thereof.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the state court's charge violated the rule of *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, when the petitioner had requested the jury be instructed that no inferences could be drawn from his failure to testify?

II. Whether the admission into evidence, at the petitioner's state trial, of the statements of a police officer in conversations between the officer and an alleged co-conspirator, which occurred outside of the petitioner's presence, was a violation of due process when the police officer's statements gave meaning to the co-conspirator's declarations and the jury were informed that only the acts and declarations of specifically

named alleged co-conspirators made in furtherance of the conspiracy were binding on the petitioner after his membership in the conspiracy had been independently established?

STATEMENT OF THE CASE

This petition for a writ of certiorari requests a review of the judgment of the Court of Appeals for the Second Circuit which affirmed, without opinion, the judgment of the District Court for the District of Connecticut dismissing a habeas corpus petition in which the petitioner alleged constitutional error by the state courts of Connecticut upon his conviction for conspiracy (Conn. Gen. Stats. Sec. 54-197). The petitioner is presently a federal prisoner confined to the penitentiary at Leavenworth, Kansas and is scheduled to commence serving his state sentence upon his release from federal custody. For this reason, the petition for a writ of habeas corpus was brought under the pending sentence doctrine of *Peyton* v. *Rowe*, 391 U.S. 53, 88 S. Ct. 1549 (1968) against the respondent in the District Court of the District of Kansas and transferred to the District of Connecticut pursuant to 28 U.S.C. Sec. 1404(a).

The state charge upon which the petitioner was tried and convicted was in substance that he (and others tried separately) conspired in violation of Conn. Gen. Stat. Sec. 54-197 to "offer money to police officers with the intention of illegally influencing the officer's behavior so that illegal gambling and unlawful liquor establishments might be permitted to operate." (App. Petitioner's brief p. 70) The questions sought to be reviewed involve the court's charge to the jury. (App. Petitioner's brief p. 70) The present petition is the petitioner's second

request for a writ of certiorari to review his conspiracy conviction. His prior request, then to review the judgment of the Supreme Court of Connecticut, *State* v. *Tropiano*, 158 Conn. 412, 262 A.2d 147 (1969) was denied by this court. *Tropiano* v. *Connecticut*, 398 U.S. 948 (1970). With respect to the two questions now presented for review, an examination of the brief which accompanied the first petition will show that the first question claiming a violation of the *Griffin* rule was not presented earlier and that the second question as phrased by the petitioner, claiming a violation of due process in the admission into evidence of the conversations between the police officer and a co-conspirator was presented earlier in the same manner as in the present petition.

The respondent's interpretation of the two questions presented for review differs somewhat from the interpretation advanced by the petitioner. To show that the respondent's interpretation is the more accurate one and that neither question merits a grant of certiorari, having in mind the considerations of Rule 19, there has been included in an appendix to this brief certain exhibits which formed a portion of the record in the court below, namely the complete charge to the jury, the opinion of the Supreme Court of Connecticut and the petitioner's petition for a writ of habeas corpus. The decision of the Court of Appeals for the Second Circuit has also been included.

ARGUMENT

I.

THE PETITIONER'S COMPLAINTS ABOUT THE CHARGE DO NOT MERIT REVIEW BY CERTIORARI.

The petitioner had requested that the jury, at his state trial, be instructed that no inferences could be drawn against him because he did not testify. The language of both his request and the court's charge are set forth in his brief. (pp. 1, 6) Since such a request was made, it was proper for the court to instruct the jury on the subject. *Bruno* v. *United States*, 308 U.S. 287, 292, 294, 60 S. Ct. 198, 199, 200 (1939); *United States* v. *Russo*, (2d Cir. 1969) 413 F.2d 432, 434; *United States* v. *Schabert*, (2d Cir. 1966) 362 F.2d 369, 372. The claim of constitutional error is therefore limited to a determination of whether the charge, as given, in effect informed the jury that from the petitioner's silence, his guilt could be inferred. See *Griffin* v. *California*, *supra* at 14, 88 S. Ct. at 1223. Because of the petitioner's request, the Ninth Circuit decision of *United States* v. *DeLaCruz Bellinger*, 422 F.2d 723 (1970) cited on page 8 of his brief, wherein the court denied the request of counsel for two defendants to comment on the refusal of a third defendant to testify is not applicable to the present situation and is not authority for his claim that constitutional error was committed.

Briefly stated, the petitioner's claim is limited to the fact that the charge contained a negative rather than a positive precept. His argument is that:

(1) Although the jury were instructed that he, as an accused, had the right or election to testify, they were not instructed that he had a right not to testify but rather that he

had no obligation to do so and that no inference of any kind should be drawn from his election; and

(2) The language, in the charge, that no inference of guilt should be drawn against him for the reason that he failed to exercise his right [to testify] meant that the jury could infer that his silence could be considered with other evidence in determining his guilt and that this instruction was related to the presumption of innocence in such manner that the jury were invited to conclude that if the presumption were rebutted, an inference of guilt could be drawn from his silence.

The Court of Appeals by its affirmance without opinion adopted the district court's decision that no particular form was required to inform the jury of the petitioner's right to remain silent and that the comments of the [state] court must not be removed from their context but were to be considered within the framework of the entire charge. (See App. Petitioner's brief pp. 70, 72) *United States* v. *Gainey*, 380 U.S. 63, 71, 85 S. Ct. 754, 759 (1965); *United States* v. *Smith*, (4th Cir. 1968) 392 F.2d 302.

The correctness of the ruling below that the [state] charge did not violate the *Griffin* rule and the consequent lack of merit in this petition for certiorari is shown by the varied language combining both positive and negative terms, which have been approved by the several Courts of Appeals to explain an accused's exercise of the privilege against self-incrimination to juries. In two recent decisions from the Fifth Circuit, *United States* v. *McGann*, 431 F.2d 1104, 1109 (1970) and *United States* v. *Lawrence*, 427 F.2d 95, 97 (1970) the jury were instructed that the law does not compel an accused to take the witness stand and that his failure to do so does not

raise a presumption of guilt nor permit an inference of any kind to be drawn. In *United States* v. *Houston*, 434 F.2d 613, 614 (1970), also from the Fifth Circuit, an approved charge coupled language that an accused could not be compelled to take the witness stand with language that he had a choice whether or not to be a witness and that it was his right not to testify if he so chose. The instruction held to be proper in *United States* v. *Gustave*, (9th Cir. 1970) 424 F.2d 539, 540 was that "(T)he appellant was not required to take the stand in his own defense, and that his failure could create no inference against appellant." While in *United States* v. *Carter*, (6th Cir. 1970) 422 F.2d 519, 520, a proper charge was that no one was obliged to testify in his own behalf and since one had an absolute right not to testify, a failure to do so could not be considered as evidence of guilt.

Nor did the [state] court's reference to the presumption of innocence and the state's burden of proof when it informed the jury that no inference of guilt be drawn from the petitioner's failure to testify impinge on his constitutional rights in the manner claimed. The Fifth Amendment gives a defendant the right to refuse to testify, but it does not give him an irrebuttable presumption of innocence. *United States* v. *McGann*, *supra* at 1109. There is a permissible connection between an accused's silence, the sovereign's burden of proof and the presumption of innocence which may be the subject of comment to a jury when an accused has requested they be instructed that no inferences should be drawn from his silence. In *United States* v. *Garguilo*, (2d Cir. 1962) 310 F.2d 249, 252, the approved charge was as follows:

> "As I have told you at the outset of my charge to prove the defendants . . . guilty beyond a reasonable doubt, and

> the burden of proof rests upon the government at all stages of the trial. It never shifts to the defendants. The defendants are presumed to be innocent as I have already told you, and they had a right to remain silent, and you must not draw any inferences from the fact that they have remained silent and you must not allude to it in any way during your jury deliberations."

As in *Garguilo*, the instructions given at the petitioner's conspiracy trial did not lessen either the state's burden of proof nor the presumption of innocence. See Appendix, Respondent's brief pars. 181, 182, 183, 186, 187, 188, 189, 190, 192, 193, 243, 247; pp. 11a-16a. *Leland* v. *Oregon*, 343 U.S. 790, 795, 72 S. Ct. 1002, 1006, (1952), *reh. denied*, 344 U.S. 848, 73 S. Ct. 4 (1952); *Sullivan* v. *Scafati*, (1st Cir. 1970) 428 F.2d 1023, 1025.

Finally the decision below was correct that the words in the charge, that no inference of guilt should be drawn against the petitioner "for the reason alone" that he did not elect to exercise his right to testify, when viewed in their proper context did not constitute improper comment. See *United States* v. *Cusumano*, (2d Cir. 1970) 429 F.2d 378, 381; *United States* v. *Lawrence*, *supra* at 96. As heretofore stated, the petitioner was tried separately from others with whom he was accused of conspiring. The jury were properly informed (App. Respondent's brief pars. 201-238, pp. 19a-32a) that if, by independent evidence, they found the petitioner to be connected to the conspiracy he was chargeable with knowledge of the acts and bound by the declarations of his co-conspirators in pursuance of the conspiracy. *Dutton* v. *Evans*, 400 U.S. 74, 91 S. Ct. 210, 215, 216 (1970); *United States* v. *Costello*, (2d Cir. 1965) 352 F.2d 848, 853, 854. The proper construction

of the charge is that the jury were informed that the petitioner's guilt could not be inferred from his silence but that the existence of the conspiracy and the petitioner's participation therein could be determined from other proper evidence. The decision of the Court of Appeals that these instructions were proper was correct. *c.f. United States* v. *Curiale*, (2d Cir. 1969) 414 F.2d 744, 748; *United States* v. *Russo*, *supra*.

II.

The Petitioner's Claim That Due Process Was Violated By The Admission Into Evidence Of The Conversations Between An Alleged Co-conspirator And A Police Officer Does Not Merit Review By Certiorari.

At the state conspiracy trial, tape recordings of telephone conversations from February 10 to February 20, 1964, between an alleged co-conspirator and a policeman which conversations occurred in the petitioner's absence were admitted into evidence. (See App. Petitioner's brief pp. 1-68) The participants in the conversations are not identified in the petitioner's appendix but reference to the opinion of the Supreme Court of Connecticut (App. Respondent's brief pp. 40a, 45a) shows that "Francis" is Francis Reynolds, a detective with the West Hartford, Connecticut police department and "Thomas" is the co-conspirator, DiBella. "Whitey", of course, refers to the petitioner, Tropiano.

While the present thrust of the petitioner's argument is that the very admission of these conversations was a violation of due process (the same claim having been made to this court in his earlier petition for certiorari) his claim of error to the

state Supreme Court (App. Respondent's brief p. 45a) and in the habeas corpus petition (App. Respondent's brief p. 62a) that originated the proceedings now sought to be reviewed was not that the conversations were erroneously admitted but rather that their admission was not accompanied by cautionary or limiting instructions concerning the effect which the jury should give to Reynolds' statements in these conversations as distinguished from those of DiBella. Brought to the attention of the Court of Appeals as well as to the attention of the district court was the opinion of the state Supreme Court which noted "The substance of the conversations concerned the defendant's (petitioner's) role in the conspiracy and the defendant (petitioner) concedes that the court did not err in receiving the recordings and transcripts in evidence". (App. Respondent's brief p. 45a) Under state procedure such a concession would be an abandonment of a claim of error, constitutional or otherwise. *State* v. *Mariano*, 152 Conn. 85, 98; 203 A.2d 305, 312 (1964), *cert. denied*, 380 U.S. 943; Maltbie, *Connecticut Appellate Procedure*, Sec. 327. Although the respondent did not urge abandonment in the (federal) courts below but rather treated the claim, properly limited, on its merits as did the respective courts the petitioner's concession should be brought to the attention of this court under the doctrine of *Edelman* v. *People of State of California*, 344 U.S. 357, 358, 73 S. Ct. 293, 295 (1953) since in effect the petitioner seeks to have the court review a question on which certiorari has already been denied.

An analysis of the petitioner's claim shows that the decision of the Court of Appeals should not be reviewed. The admission of the statements of the co-conspirator, DiBella in the conversations was neither error nor a violation of due process.

Dutton v. *Evans, supra; United States* v. *Clayton,* (1st Cir. 1971) 450 F.2d 16, 19. Parenthetically the language of the [state] court's charge (see App. Respondent's brief, par. 238, p. 32a) shows that Connecticut is in accord with the federal rule that such declarations must be in furtherance of the conspiracy. See *Dutton* v. *Evans, supra; Krulewitch* v. *United States,* 336 U.S. 440, 443, 69 S. Ct. 716, 718. (1949). Out of court declarations of an alleged conspirator introduced to prove the truth of the matter asserted can be used against other alleged conspirators if there is independent proof of the conspiracy. *United States* v. *Costello,* (2d Cir. 1965) 352 F.2d 848, 853; *Taylor* v. *United States,* (D.C. Cir. 1958) 260 F.2d 737, 738. The order of proof in a conspiracy trial is in the discretion of the trial court. *United States* v. *Knight,* (9th Cir. 1969) 416 F.2d 1181, 1185. Since DiBella's statements were admissible, subject to connection, Reynolds' part of the conversation was also admissible either to bring out the meaning of DiBella's conversation, *United States* v. *Morello,* (2d Cir. 1957) 250 F.2d 631, 634 or to show DiBella's involvement in an existing conspiracy to which the petitioner might be linked by independent proof. *United States* v. *Costello, supra* at 854. Such independent proof of the conspiracy and the involvement of the petitioner therein did exist as shown by the evidence before the jury as recited in the opinion of the Connecticut Supreme Court (App. Respondent's brief pp. 37a, 42a, 43a) that arrangements were being sought for police protection of illegal gambling operations and on January 30, 1964, almost two weeks before the start of the conversations in question, DiBella had informed Reynolds, who was a witness at the trial, that the petitioner was the "top man" from whom payoffs would come and then at a meeting the petitioner, him-

self, told Reynolds "The only thing I want from Ahern (a New Haven, Connecticut police sergeant) are the crap games. Horses can come later" and discussed the amount that would be paid for this service.

Remaining to be considered is whether the decision of the Court of Appeals that the lack of express cautionary instructions, in this particular case, as to the use which the jury might make of the police officer's portion of the telephone conversation was not a violation of due process. The decision below, as shown by the opinion of the district court (App. Petitioner's brief p. 70) was in accord with the decision of the state Supreme Court which while acknowledging that cautionary instructions should have been given found such omission harmless. (App. Respondent's brief p. 46a) The jury had been instructed that they could not find the petitioner guilty unless they found that he had conspired with one or more of the specific persons named in the information as co-conspirators which names were repeated several times (App. Respondent's brief pars. 228, 229, 239, 240; pp. 29a, 32a, 33a); that the police officers, including Reynolds, were excluded from the named individuals with whom the petitioner was accused of conspiring and their role explained (App. Respondent's brief pars. 166, 221, 236; pp. 6a, 26a, 27a, 31a); that the acts and declarations of an alleged co-conspirator did not implicate the petitioner until he had been proved to be a member of the conspiracy by other evidence but once he had been proved to be such a member, the acts and declarations of a co-conspirator or in other words the acts and declarations of another person named in the information made in furtherance of the conspiracy were admissible against him. (App. Respondent's brief pars. 236, 237, 239; pp. 31a, 32a) Therefore the

charge adequately informed the jury that only the acts and declarations of co-conspirators in furtherance of the conspiracy could be used against the defendant which necessarily excluded Reynolds' portion of the telephone conversations.

The decision below that the "Although Reynolds' part in the conversation was not admissible to prove the truth of any assertions made by him, since he admittedly was not a co-conspirator nevertheless his portion of the conversation was admissible for the limited purpose of giving meaning and coherence to DiBella's statements" and that in effect the jury had been so instructed was correct. (App. Petitioner's brief p. 70, App. Respondent's brief p. 46a) *United States* v. *Morello*, *supra*; 7 Wigmore, *Evidence* (3d ed.) Secs. 2097, 2099.

CONCLUSION

The petitioner's second petition for a writ of certiorari this time to review the judgment of the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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